Supreme Court, U.S.
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No. 96-

In The

Supreme Court of the United States

October Term, 1995

K MART CORPORATION,

Petitioner,

v.

CARL HELTON, CHARLES W. KEMPTON, NICK PAYNE, JAMES E. TAYLOR, BOB WILLIAMS, AND DAVID JACK WRIGHT,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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137 pp

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Eleventh Circuit err when it affirmed a ruling allowing an ADEA class action to proceed that conflicts with the ruling in *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1996) and other similar cases and is inconsistent with this Court's ruling in *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989) on the following legal issues:

(a) Does the "similarly situated" standard under 29 U.S.C. § 216(b) allow a disparate treatment ADEA case to be converted into a class action on the eve of trial without considering the standards governing joinder and severance of claims under the Federal Rules of Civil Procedure;

(b) Is probative evidence of a discrete, identifiable policy of age bias required to permit an ADEA class action to proceed; and

(c) Should concerns about the "manageability" and "fairness" of proceeding with a series of multiple, disparate treatment claims in a single ADEA case limit the scope of the class?

2. Did the United States Court of Appeals for the Eleventh Circuit err in affirming the trial court's ruling granting the plaintiffs' untimely, post-discovery motion to convert their individual complaint into an ADEA class action where another federal judge in the same district had previously ruled that similar ADEA claims of eleven other plaintiffs represented by the same counsel could not be tried jointly in one case under Rules 20 and 42 of the Federal Rules of Civil Procedure?

QUESTIONS PRESENTED - Continued

3. Did the United States Court of Appeals for the Eleventh Circuit err in ruling that opt-in plaintiffs may join an ADEA class to assert individual, disparate treatment claims without having filed charges of discrimination with the EEOC, where the ruling conflicts with the decision in *Thomure v. Phillips Furniture Co.*, 30 F.3d 1020 (8th Cir.1994) ("piggy-backing" should be limited to cases attacking "continuing violations"), *cert. denied*, 115 S. Ct. 1255 (1995), and is inconsistent with numerous decisions emphasizing the importance of timely investigation and conciliation of employment discrimination claims?

LIST OF PARTIES

The following parties were Plaintiffs below and are Respondents before this Court:

Original Plaintiffs: Carl Helton, Charles W. Kempton, Nick Payne, James E. Taylor, Bob Williams

Intervenors and Opt-Ins: David Jack Wright, Mike Williams, Larry Good, Robert Windell, Robert Defoe, Robert Ennis and Edna Portilla

The following party was a Defendant below and is a Petitioner before this Court:

K Mart Corporation[1]

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[1] K Mart Corporation has no parent company or non-wholly owned subsidiaries.

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INTRODUCTION

Petitioner K Mart Corporation ("K Mart") respectfully prays that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit, filed April 9, 1996.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit is published at 79 F.3d 1086 and is reprinted in the accompanying Appendix to this petition at pages 2-51. The unpublished June 29, 1994 opinion of the United States District Court for the Northern District of Georgia (Shoob, J.) is reprinted in the Appendix to this petition at pages 51-61.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals. The Eleventh Circuit's decision in this case was entered on April 9, 1996. K Mart timely filed a Suggestion of Hearing *En Banc* and Petition for Rehearing, which was denied by the Eleventh Circuit on June 17, 1996. The denial is reproduced in the Appendix to this petition at pages 93-95. This petition is timely filed.

STATUTES INVOLVED

Relevant provisions of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, and the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. 201 *et seq.*, are set forth in the Appendix to this petition at pages 96-99.

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition Below

On October 29, 1992, five plaintiffs filed this lawsuit in the United States District Court for the Northern District of Georgia in accordance with 28 U.S.C. § 1331 alleging, *inter alia*, that defendant had violated the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621, *et seq.*, by demoting them from their positions as store managers of five separate stores located in Georgia and Florida. Plaintiff's allegations in this case were essentially the same as the allegations in *Grayson, et al. v. Kmart Corp.*, Civil Action No. 1:92-CV-141-JEC (N.D.Ga.), filed more than ten months earlier by the same counsel. However, unlike the eleven plaintiffs in *Grayson*, the *Helton* plaintiffs did not allege that they had filed their lawsuit on behalf of other "similarly situated" employees or that the case should proceed as a class action under 29 U.S.C. § 216(b).

During more than two years of discovery, the parties exchanged information about the named plaintiffs and reviewed statistics about personnel decisions affecting store managers employed in the three "subregions" (the

Bontekoe, Clifton, and Lynch regions) in which the *Grayson* and *Helton* plaintiffs had been employed. K Mart produced over 17,000 documents, including financial data about the operating results of other stores in plaintiffs' districts. K Mart expended considerable time and effort preparing specialized personnel listings about the more than 400 store managers employed in plaintiffs' "subregions" from 1990 to 1993. This data has been the subject of detailed analysis by the parties' experts.

On February 22, 1994, after completion of discovery in both cases[2], the Honorable Julie E. Carnes issued a detailed order ruling that the claims of the eleven plaintiffs in *Grayson* were not properly joined under Fed. R. Civ. P. 20 and that those claims should be severed for separate proceedings in accordance with Fed. R. Civ. P. 42(b). *Grayson v. K Mart Corp.*, 849 F. Supp. 785 (N.D.Ga. 1994) (reprinted in Appendix ("App.") at pp. 61-79). Six days later, on February 28, 1994, counsel for the *Grayson* plaintiffs filed motions on behalf of the five *Helton* plaintiffs to amend their complaint to convert the lawsuit to an "opt in" class action pursuant to 29 U.S.C. § 216(b).[3]

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[2] The *Helton* plaintiffs did not seek any extension of the discovery period or file any motion to expand the scope of discovery before discovery ended. *See* N.D.Ga. Local Rule 225-1(b) (Motions to extend discovery "must be made prior to expiration of the existing discovery period and will be granted only in exceptional cases. . . . ").

[3] K Mart's motion for severance and transfer had been pending in *Grayson* since March 17, 1993, but the *Helton* plaintiffs took no action to convert their lawsuit to a class action until after Judge Carnes ruled. Obviously the *Helton* motions were a thinly veiled attempt to ask a different federal judge effectively to overrule the severance order in *Grayson*.

On July 29, 1994, Judge Shoob granted plaintiffs' motions. (*See* App., pp. 51-61). Focusing first on the class action issue, he concluded that the "similarly situated" language of 29 U.S.C. § 216(b) did not require plaintiffs seeking to pursue an ADEA class action to establish that they had been affected individually by a "discrete program or procedure" of age bias and that "substantial allegations of common issues of law and fact" would justify allowing "collective" litigation of plaintiffs' claims. (App., p. 54). Citing his "limited discretion to deny a party leave to amend" and concluding that "substantial countervailing reasons" to deny plaintiffs' motion did not exist, Judge Shoob allowed the class action to proceed. (App., p. 57). Judge Shoob subsequently allowed this decision to be appealed to the Eleventh Circuit pursuant to 29 U.S.C. § 1292(b), and the Eleventh Circuit granted K Mart's Petition for Permission to Appeal.

In its April 9, 1996 decision styled *Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996) (App., pp. 2-51), the Eleventh Circuit Court affirmed in part and reversed in part the July 29, 1994 Order of the District Court.[4] The

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Immediately after entry of the severance order and being unaware that Judge Carnes had already ruled on the transfer issue, *see Bell v. K Mart Corp.*, 848 F. Supp. 996 (N.D.Ga. 1994) (App. pp. 80-92), the *Grayson* plaintiffs from North Carolina and Florida withdrew their objections to the transfer of their severed claims to district courts in those states.

[4] K Mart's interlocutory appeal in *Helton* had been consolidated with an appeal of right from a judgment entered in *Grayson, supra,* dismissing the plaintiffs' claims without prejudice to allow them the opportunity to opt-into the *Helton* class. Because the Eleventh Circuit concluded that the *Grayson* dismissal was not a final order, the court dismissed the appeals

Eleventh Circuit affirmed the District Court's decision allowing plaintiffs to amend their complaint to create an opt-in class, but reversed and remanded the District Court's decision to broaden the temporal scope of the class to include persons, such as the plaintiffs in *Grayson*, who had been demoted more than three years before they opted into the ADEA class.[5] *See* note 4, *supra*. The Eleventh Circuit subsequently denied K Mart's timely Petition for Rehearing and Suggestion of Rehearing *En Banc*.

2. Statement of Facts

At the time of their demotions, the five original *Helton* plaintiffs lived and worked in five separate stores in five different cities in Georgia and Florida. Plaintiffs, who range in age from barely being protected by the ADEA (age 41) to age 51, allege that they were demoted because of their ages. Any similarity between plaintiffs' claims ends there. Each plaintiff worked in a different store, located in different districts, and reported to different District Managers at the time of his demotion. The three Florida plaintiffs did not even report to the same Regional Manager as the two Georgia plaintiffs. Because each K Mart store is operated as its own profit center,

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in that case and did not consider the substance of the *Grayson* court's severance ruling. (*See* App., pp. 12-16).

[5] The EEOC filed a petition to intervene, which was granted while the appeal was pending; but the EEOC was not a party to the appeal. The plaintiffs argued that the EEOC's intervention mooted the appeal, but the Eleventh Circuit obviously concluded otherwise.

there is no dispute that the facts pertinent to each plaintiff's work history and background are very different. Adjudication of each plaintiff's individual claim will require analysis of fact-specific decisions made by many different supervisors based on the unique management circumstances and operations of each plaintiff's store.

After reviewing the evidence, Judge Carnes ruled in *Grayson* that plaintiffs had not "directed this Court's attention to any discrete program or procedure employed by K Mart that affected each of the plaintiffs in this litigation." (App., p. 66). She rejected plaintiffs' arguments that their demotions had resulted from "blind" adherence to any "discrete" or other identifiable policy to discriminate against older employees:

> Plaintiffs point to centralized policy-making and review and claim that such control indicates that each plaintiff's local managers did nothing more than blindly implement company policy without exercising any independent judgment. *Plaintiffs' assertions are not supported by the record.* While the decisions to demote the plaintiffs could not have been implemented without approval by the Southern Regional Vice President, John Valenti, the *undisputed evidence establishes that the recommendation to make such a demotion originated with the individual employee's district and regional managers.*

(App., pp. 68-69) (emphasis added).

Judge Carnes concluded that "each demotion decision affecting the plaintiffs in these cases was a discrete act by the defendant." (App., p. 70). In contrast, the Eleventh Circuit ruled as a matter of law that identifying

a discrete policy of age bias was *not* a requisite of an ADEA class action case. Nevertheless, the appellate court's decision cited virtually every item of extraneous anecdotal (and K Mart submits inadmissible) evidence cited by the *Helton* plaintiffs as evidence that they were victims of an "age-motivated purge." (App., pp. 22-27). K Mart submits that such evidence, which consists principally of non-probative, misleading statistics, stray remarks by non-decisionmakers[6] and anecdotal testimony about time-barred events, shows no nexus whatsoever between any identifiable policy or practice of age bias and any of the individual employment decisions at issue in this litigation.

For instance, the Eleventh Circuit cited plaintiffs' "expert" statistics, which show merely that if no hiring, discharge or demotion decisions had been made (and no employee died or resigned), the workforce would "age" by three years over a three-year period and contain proportionately more older employees. Such testimony is meaningless. Obviously employment decisions were

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[6] The appellate court cited testimony from excerpts of speeches given by Mr. Joseph Antonini, K Mart's former Chairman, without regard to the context in which the remarks were made and without considering the undisputed evidence that Mr. Antonini, who was employed at a level at least six levels removed from plaintiffs, had no input whatsoever into any of the demotion decisions at issue. As ruled in *Nesbit v. PepsiCo, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993), remarks by non-decisionmakers and similar stray remarks unrelated to any decision affecting the plaintiffs do not establish an ADEA case. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J. concurring).

made and other events occurred (deaths and resignations) that changed the composition of the workforce. However, during the three-year period of the alleged "purge" of older store managers, the average age of the store manager workforce remained the same (age 41); the percentage of age 40 or older store managers increased from 48.8% to 55.1%; and the average earnings of the 40 or older group increased. The earnings of store managers under age 40 actually decreased. This data contradicts the assertion that an age-related "purge" occurred.

Similarly, the Eleventh Circuit cited the "building a case" testimony in the affidavit of Mr. W.A. Sands as support for plaintiffs' allegations that "K Mart targeted older store managers for criticism and built a paper trail that would be grounds for their demotion." (App., p. 25). However, the panel neglected to point out that when deposed in his own ADEA lawsuit against K Mart, Mr. Sands testified without equivocation that the evaluations of store managers that he prepared were accurate and that no superior told him to fabricate records to build a case against anyone. Similarly, the Eleventh Circuit failed to note that Mr. Charles Wester, who also supplied a non-probative, conclusory affidavit about file building, had lost his own ADEA case against K Mart on summary judgment. *See Wester v. Kmart Corp.*, Case No. 94-8504, 1995 LEXIS 20355 (S.D.Fla. 1995).[7]

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[7] Similarly, the testimony of David Marzano, who also had sued K Mart in a separate commercial dispute, lacks any probative value. Mr. Marzano testified that he had no knowledge whatsoever of any employment decision affecting plaintiffs or any other store manager in K Mart's Southern Region; that he had no knowledge of personnel practices in the

K Mart submits that any dispute about plaintiffs' "file building" theory actually highlights the reasons why this case should *not* be tried as an opt-in class action. Plaintiffs cannot have it both ways. Their case either arises out of an identifiable policy and practice of age bias; or it is based on a series of unique, discrete reports placed in plaintiffs' files to document individual performance. Indeed, during more than two years of discovery, not one manager or former manager with personal knowledge of plaintiffs' files has testified (either in *Helton* or *Grayson*) that any of the audits, financial reports, store visits and similar documents in those files were false or fictitious. *See, e.g., Barnhart v. Mack Trucks, Inc.*, 52 F.3d 328 (7th Cir. 1995) (plaintiff's "paper trail" contention does not establish a triable issue absent any " 'factual evidence indicating that the complaints against [plaintiff] were fabricated or unfounded.' ").

Given the diversity of facts, background evidence and individual decision-making at issue, it would be impossible for K Mart to obtain a fair trial before a single jury if that jury were asked to distinguish between the different facts pertinent to each individual claim in one, multi-plaintiff trial:

> Each plaintiff must prove liability on the part of the defendant with respect to the adverse action defendant took with respect to him. It is precisely this need to focus the jury's attention on the merits of each individual plaintiff's case that

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Southern Region; and that he had not had any business dealings with Mr. Valenti or any other K Mart manager after the relationship between his company and K Mart ended in March, 1989, *two years* before any of the decisions at issue occurred.

> counsels against proceeding with these cases in one consolidated trial. There is a tremendous danger that one or two plaintiff's unique circumstances could bias the jury against defendant generally, thus, prejudicing defendant with respect to the other plaintiffs' claims.
>
> * * *
>
> In these cases, there are eleven factual situations and eleven sets of witnesses with testimony pertinent to those situations. Moreover, plaintiffs' state law claims arise under the laws of four different states. The resulting confusion and prejudice from the scenario presented by a common trial of all plaintiffs' claims against the defendant would be intolerable.

(App., pp. 73-74). Judge Carnes described these manageability and fairness concerns as the "overriding" reason the disparate treatment claims at issue in the *Grayson* case should not be tried together in one consolidated proceeding. (App., p. 76).

REASONS FOR GRANTING THE WRIT

1. The Eleventh Circuit's Decision That An ADEA Class Action Is Not Subject To The Standards Governing Joinder Of Multiple Claims Under The Federal Rules Of Civil Procedure Conflicts With Decisions Of This Court And Other Circuits.

The decision below is in direct conflict with the admonitions of this Court in *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989); with the Fifth Circuit's decision

in *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995); and with decisions of other circuits addressing "spurious" class actions under the FLSA. Accordingly, certiorari is appropriate here. *See Acosta v. Louisiana Dep't of Health and Human Res.*, 478 U.S. 251, 253 (1986) (granting writ to resolve conflicting interpretations of Fed. R. App. P. 4).

Judge Shoob declined to follow Judge Carnes's February 22, 1994 severance ruling in *Grayson, supra*, because that ruling was based on the proposition that plaintiffs had failed to establish that any "discrete program or procedure employed by K Mart . . . affected each of the plaintiffs." *See Helton* (App., p. 53). Judge Shoob concluded (and the Eleventh Circuit Panel agreed) that the "similarly situated" requirement in Section 216(b) of the FLSA does not require the plaintiffs to demonstrate a "discrete program or procedure." (App., pp. 53; 20-21). Citing the decision in *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989), the courts below concluded that plaintiffs' "substantial allegations" that an upper-management policy resulted in an age-related purge of older store managers were enough to permit the "opt-in" plaintiffs to proceed "collectively" in a single ADEA case. (App., pp. 54; 19).

In relying solely on the portion of the *Sperling* opinion sanctioning "collective," ADEA proceedings, *see* App., p. 19, the Eleventh Circuit Panel and Judge Shoob overlooked the procedural posture of the *Sperling* case. In *Sperling*, the Court's decision focused on the "narrow" issue of the propriety of issuing court-sanctioned notice to the members of a prospective opt-in class. *Sperling* does not sanction an eleventh hour, post-discovery

amendment that would effectively overrule a contrary order entered by another judge in the same district; that would convert an individual case to an opt-in, class-wide action; and that would require the parties to begin expensive, new discovery when the case is ready for final disposition on the merits. *Sperling* did not address the "similarly situated" issue, the question of whether the "opt-in" joinder standards under 29 U.S.C. § 216(b) (1988) should differ from joinder standards under the Federal Rules of Civil Procedure, or the issue of whether persons who never filed any charges of discrimination should be allowed to "piggyback" on other charges.

In *Mooney v. Arabian American Oil Co.*, No. H-87-498, 1993 WL 739661 (S.D.Tex. Aug. 25, 1993), *aff'd*, 54 F.3d 1207 (5th Cir. 1995), the District Court noted that *Sperling* was limited to the "narrow" procedural issue about notice and "did not address the 'similarly situated' issue," noting also that the district "court's 'similarly situated' determination [in *Sperling*] was preliminary in nature, based upon the record in its nascent form. . . . " 1993 WL 739661 at *8 n. 9. As ruled in *Mooney*, after discovery is complete, "due process concerns require the court to scrutinize the opt-in plaintiffs and their respective claims with a more exacting eye to determine if they are in fact 'similarly-situated' within the meaning of the statute. . . . " *Id.* at *8. In dismissing the claims of more than 130 opt-in plaintiffs who had joined the case, the *Mooney* court concluded that an ADEA class action was not appropriate when adjudication of the "diverse" circumstances of each plaintiff would require an "individualized" factual inquiry and where the claims at issue were

the product of "bottom up" decisionmaking, initiated "on a decentralized level by local management." *Id.* at *6.

The United States Court of Appeals for the Fifth Circuit affirmed dismissal of the "class" in *Mooney*, relying expressly on the District Court's decision. 54 F.3d at 1214-16. However, the Eleventh Circuit completely disregarded the class action ruling in *Mooney*, erroneously concluding that the manageability concerns flowing from joining of individual, disparate treatment claims of multiple plaintiffs in one ADEA lawsuit were irrelevant. This ruling overlooks the portions of the *Sperling* decision in which this Court, on four separate occasions, pointed out that 29 U.S.C. § 626(b) permits the joinder of multiple parties where there are "common issues of law and fact arising from the same alleged discriminatory activity." 493 U.S. at 170. In such a case, a district court must manage joinder in an orderly, sensible manner that is consistent with procedural protections in the Federal Rules, including adherence to an appropriate "scheduling order limiting time for various pretrial steps such as joinder of additional parties." *Id.* at 173.

As noted by the Fifth Circuit in *Mooney*, when considering a multi-faceted joint trial of a series of disparate treatment age discrimination claims, no court has allowed an ADEA class action to continue. 54 F.3d at 1214. *See, e.g., Gorence v. Eagle Food Ctrs., Inc.*, No. 93-C-4862, 1994 WL 445149 (N.D.Ill. Aug. 16, 1994); *E.E.O.C. v. MCI Int'l, Inc.*, 829 F. Supp. 1438 (D.N.J. 1993); *Ulvin v. Northwestern Nat'l Life Ins. Co.*, 141 F.R.D. 130 (D.Minn. 1991); *Pines v. State Farm Gen. Ins. Co.*, 58 Fair Empl. Prac. Cas. (BNA) 387 (C.D. Cal. 1992); *Walker v. Mountain States Tel. & Tel. Co.*, No. 87-M-790, 1988 U.S. Dist. LEXIS 17553 at * 4 (D.

Colo. Sept. 26, 1988); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 370-73 (D.N.J. 1987), *rev'd in part on other grounds sub. nom. Lusardi v. Lechner*, 855 F.2d 1062 (3d Cir. 1988), *adhered to on remand*, 122 F.R.D. 463 (D.N.J.), *app. dismissed*, 975 F.2d 964 (3d Cir. 1992). *See generally In re Fibreboard Corp.*, 893 F.2d 706, 711-712 (5th Cir. 1990) (joint trial of disparate, individual personal injury claims would be "no more than the testimony of experts regarding their claims, as a group, compared to the claims actually tried to the jury"). By failing to address the class action aspects of the *Mooney* ruling[8] or even consider the manageability and fairness factors inherent in allowing any class action to continue, the Eleventh Circuit committed clear error.

Moreover, the Eleventh Circuit's conclusion that "joinder" standards of the Federal Rules of Civil Procedure need not be considered in determining whether an ADEA class action should proceed is inconsistent with numerous cases holding that an ADEA opt-in class action under 29 U.S.C. § 216(b) is a form of "spurious" class action that is in the nature of a device for "permissive joinder" of parties. *Zahn v. International Paper Co.*, 414 U.S. 291, 298 n.6 (1973) (the "spurious" class action of former Rule 23(a)(3) was "merely an invitation to joinder. . . . "); *Lipsett v. United States*, 359 F.2d 956 (2d Cir. 1966) (the "spurious" class action is a "mere device for permissive joinder" that differs from the representative form of class action); *Schatte v. International Alliance of Theatrical Stage Employees*, 183 F.2d 685, 687 (9th Cir. 1950)

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[8] The Eleventh Circuit cited *Mooney* only to support its holding regarding piggybacking. (App., p. 35). *See* Section 3, *infra*.

("spurious class suit" is "merely a permissive joinder device in which the right and liability of each individual plaintiff is distinct"), *cert. denied*, 340 U.S. 827 (1950). Because opt-in joinder should be subject to the same standards as permissive joinder under Rule 20(a), the Eleventh Circuit Panel and Judge Shoob erred in refusing to consider those standards in applying the "similarly situated" language of 29 U.S.C. § 216(b). *See also Kainz v. Anheuser-Busch, Inc.*, 194 F.2d 737, 743 (7th Cir.), *cert. denied*, 344 U.S. 820 (1952).

The Eleventh Circuit's decision effectively resurrects an "across-the-board" form of ADEA class action that has been rejected in virtually every other type of class-wide case. *See, e.g., General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). In *Falcon*, this Court conclusively determined that claims of employment discrimination are not automatically susceptible to "across-the-board," class action treatment:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been . . . [discriminated against], and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Id. at 157. As ruled in *Falcon*, if individual issues predominate, class action treatment is not appropriate. *See, e.g., Wheeler v. Columbus*, 703 F.2d 853, 855 (5th Cir. 1983) (where "[d]iscrimination in its broadest sense is the only

[common] question alleged . . . " class action treatment is not appropriate); *Dickerson v. United States Steel Corp.*, 582 F.2d 827, 834 (3d Cir. 1978) (finding issues unsuitable for class-wide joinder where "litigation of . . . [a] purported general policy of defendant, as it might affect each plaintiff here, would inevitably focus in detail on the separate work histories of each plaintiff"). There is no policy reason for applying different standards in an ADEA class action case. *See Gorence v. Eagle Food Ctrs., Inc.*, No. 93-C-4862, 1994 WL 445149 at *10 (N.D. Ill. Aug. 16, 1994).

Application of these factors and appropriate "joinder" standards to the issues presented is consistent with *Sperling*, with *Mooney*, and with the majority of lower court decisions addressing ADEA class action manageability issues at the trial stage. Because the Eleventh Circuit's decision is inconsistent with this authority, a writ of certiorari should issue to clarify the law in this area.

2. The Writ Should Issue To Correct The Clear Error Allowing An Individual Action To Be Converted To A Class Action At The Eleventh Hour.

The Eleventh Circuit concluded, after reviewing plaintiffs' alleged "evidence," that Judge Shoob did not abuse his "discretion" in allowing an ADEA class action to proceed. However, for the reasons stated above, Judge Shoob and the Eleventh Circuit applied the wrong legal standards in deciding the class action issue. As recognized in *Lipsett v. United States*, *supra*, the "exercise of

discretion based on a misconception of the law is an abuse of discretion." 359 F.2d at 959.

K Mart respectfully submits that the lower courts' rulings violate virtually every procedural safeguard designed to ensure fairness to litigants in federal courts. For instance, under Local Court Rules, the time for amendments had expired more than a year before plaintiffs moved to amend. Those rules also require class action determinations to be made promptly. However, Judge Shoob's ruling allows the case to be converted into an ADEA class action after discovery has closed, after motions for summary judgment have been filed, and after Judge Carnes had severed the *Grayson* cases for separate trials. The ruling requires discovery to be reopened; expands the geographic scope of the case from five stores in two states to encompass approximately 700 stores in eighteen states, the Virgin Islands and Puerto Rico; requires development and analysis of new statistics; and requires K Mart to compile thousands of pages of new documents. Obviously K Mart is prejudiced by these rulings.

The *Sperling* ruling does not sanction a district court's "unbridled discretion," 493 U.S. at 174, to allow class notice in a case such as *Helton*, which was not filed initially as a class action and in which plaintiffs did not seek leave to amend their complaint to allege a class action until discovery had been completed and Judge Carnes had issued severance and transfer orders in the *Grayson* litigation. Rather, a district court must "manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands *or the provisions of the Federal Rules of Civil*

Procedure." Id. at 170 (emphasis added). There is not any hint in *Sperling* that the interests of "judicial economy" outweigh the procedural protections in the Federal Rules against untimely amendments and improper joinder. In *Sperling*, this Court noted specifically that the authority to supervise notice to an ADEA class should be managed "in an orderly fashion . . . reinforced by Rule 16(b),[9] requiring entry of a scheduling order *limiting time for various pretrial steps such as joinder of additional parties." Sperling*, 493 U.S. at 173 (emphasis added).

Under Local Court Rules governing this case and in accordance with the Scheduling Order entered on February 12, 1993, the time for amendment of the *Helton* complaint to add class-wide claims expired not later than February 6, 1993, *more than one year before* plaintiffs filed their belated motion to amend. Even if the February 12, 1993 Scheduling Order were not binding under Fed. R. Civ. P. 16(b), the trial court's order is blatantly inconsistent with Rules requiring movants to make "timely application" for permissive intervention, Fed. R. Civ. P. 24(b), and providing that leave to amend a pleading should be granted only "when justice so requires." Fed. R. Civ. P.

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[9] According to Rule 16(b), deadlines established in a scheduling order can be extended only upon a showing of "good cause," Fed. R. Civ. P. 16(b); but plaintiffs failed to establish any "cause" for their delay in moving to amend. As recognized by many courts, "[t]he careful scheme of reasonable framing and enforcement of scheduling orders for case management would . . . be nullified if a party could inject amended pleadings upon a showing of less than good cause after scheduling deadlines have expired." *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 469 (D.N.J. 1990).

15(a). "Justice" does not require a motion for leave to amend to be granted in circumstances involving undue delay, bad faith, dilatory motive or undue prejudice to the party opposing the amendment. *See Foman v. Davis*, 371 U.S. 178 (1962).

The trial court found that K Mart had not presented "countervailing reasons" warranting denial of plaintiffs' untimely motions. K Mart respectfully submits that this statement confirms that neither the trial court nor the Eleventh Circuit properly examined the substantive and procedural issues addressed above. Indeed, the need for significantly expanded discovery is often cited as a basis for denying a motion to amend submitted after or near the end of the discovery period. *See, e.g., Bryson v. Waycross*, 888 F.2d 1562 (11th Cir. 1989) (upholding district court's denial of plaintiff's motion to amend complaint to add new claims during the last week of the discovery period because the defendant would be unduly prejudiced); *Quaker State Oil Refining Corp. v. Garrity Oil Co.*, 884 F.2d 1510 (1st Cir. 1989) (affirming district court's denial of motion to amend submitted near the end of discovery period because nonmoving party would be prejudiced by need for additional discovery); *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663 (5th Cir.) (plaintiff's post-discovery motion to amend complaint to add new factual and legal claims was properly denied because of likelihood of prejudice to defendant), *cert. denied*, 454 U.S. 1098 (1981); *McCann v. Frank B. Hall & Co.*, 109 F.R.D. 363 (N.D. Ill. 1986) (post-discovery motion to amend complaint denied because it would unduly prejudice defendant by necessitating additional discovery).

Reversal of the order granting plaintiffs' eleventh hour motions will ameliorate substantial prejudice to K Mart, will expedite disposition of the named plaintiffs' claims and will not prejudice their interests in any way. In light of the massive additional costs to defendant and substantial delays caused by adding new claimants to the lawsuit and effectively starting discovery over on the eve of trial, the fact that prospective, opt-in claimants may be foreclosed by their own inaction from pursuing individual ADEA claims is not a sufficient reason to allow a class action to commence at this stage in the case.

Another "countervailing reason" for denying plaintiffs' amendment is the issuance, a few days before plaintiffs moved to amend, of the thorough severance and transfer orders in *Grayson* and *Bell*. Even assuming Judge Shoob was not bound to follow *Grayson*, he should have given deference to the substance of Judge Carnes's ruling that standards of manageability and fairness should preclude joinder of these multiple, disparate treatment claims in one case. *Cf. Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 817 (1988) (one court should not "revisit prior decisions of its own or of a coordinate court . . . [absent] extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.' "); *Feller v. Brock*, 802 F.2d 722, 727-28 (4th Cir. 1986) (recognizing the long-standing judicial policy that "coordinate courts should avoid issuing conflicting orders"); *Stevenson v. Four Winds Travel, Inc.*, 462 F.2d 899, 904-05 (5th Cir. 1972) (holding that one judge of a United States District Court should "respect and not overrule [the] decision and order" of a prior judge of the same court). *See generally ACF Indus., Inc. v.*

Guinn, 384 F.2d 15 (5th Cir. 1967) (finding abuse of discretion where judge vacated prior order of another judge in the same court), *cert. denied*, 390 U.S. 949 (1968); *Prack v. Weissinger*, 276 F.2d 446, 450 (4th Cir. 1960) ("in federal practice, judges of coordinate jurisdiction, sitting in cases involving identical legal questions under the same facts and circumstances, should not reconsider the decisions of each other").

Judge Shoob and the Eleventh Circuit converted this case to a class action without applying appropriate procedural provisions of the Federal Rules of Civil Procedure. Because those provisions and pertinent provisions of the employment discrimination laws that prevent litigation of stale claims are essential hallmarks of the "evenhanded" administration of justice, *see Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984), the Eleventh Circuit decision should be vacated and Judge Shoob's ruling reversed.

3. The Eleventh Circuit's "Piggybacking" Ruling Conflicts With Decisions Of The Eighth Circuit And This Court Strictly Enforcing The ADEA's Charge-Filing Requirement.

The decision below ignores precedent strictly applying the provisions of 29 U.S.C. § 216(d) (1994) that require the timely filing of a charge as a prerequisite to suit in federal court and also conflicts with the Eighth Circuit's decision in *Thomure v. Phillips Furniture Co.*, 30 F.3d 1020 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1255 (1995). Accordingly, certiorari is appropriate here. *See Acosta, supra.*

The ADEA requires persons aggrieved by alleged age bias to file a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). 29 U.S.C. § 626(d). As many courts have recognized, the charge-filing requirement plays an essential role in the administrative and judicial enforcement of the ADEA. The interests served by the charge-filing requirement include "the promotion of informal, good faith negotiation and voluntary compliance, speedy and peaceful resolution of claims, preservation of evidence and records, and conserving court resources. . . . " *Edwards v. Kaiser Aluminum and Chem. Sales, Inc.*, 515 F.2d 1195, 1199 (5th Cir. 1975); *see also Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981) (*en banc*). The Fifth Circuit Court of Appeals stated the following about the requirement:

> It is logical that the 180 day notice was intended to ensure that potential defendants would become aware of their status and the possibility of litigation reasonably soon after the alleged discrimination. . . . In turn this would promote the good faith negotiation of employers during the 60 day conciliation period and provide an opportunity for preservation of evidence and records for use at a trial necessitated by failure of negotiation.

Powell v. Southwestern Bell Tel. Co., 494 F.2d 485, 488 (5th Cir. 1974). The administrative filing and conciliation requirements commonly are cited as a basis for refusing to allow punitive and compensatory damages under the ADEA because the availability of large monetary awards would discourage conciliation of claims before the EEOC. *See, e.g., Murphy v. American Motors Sales Corp.*, 570 F.2d

1226 (5th Cir. 1978); *Dean v. American Security Co.*, 559 F.2d 1036 (5th Cir. 1978), *cert. denied*, 434 U.S. 1066 (1978).

"Piggybacking," also known as the "single filing" concept, allows persons who did not file timely charges (and thus did not utilize the investigative and conciliation efforts of the EEOC) to rely on an ADEA charge filed by someone else. K Mart submits that there is no statutory basis and no basis in the jurisprudence of this Court for completely relieving a claimant from having to comply with this important, administrative prerequisite to suit. *See Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). *See also Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 904 (1989).

The Eleventh Circuit allowed "piggybacking" based in large part on *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446 (11th Cir. 1993), a Title VII case applying the single filing concept in a non-class action case. The decision in *Anson v. University of Tex. Health Science Ctr.*, 962 F.2d 539, 541 (5th Cir. 1992), also cited by the Eleventh Circuit, allowed piggybacking in an ADEA case; but that decision was based on the erroneous conclusion that when Congress changed "notice of intent to sue" language in the former "180-day rule" provision to a "charge" filing requirement, H.R. 5383, 95th Cong., 2d Sess. (1978), it effectively intended to permit persons to join ADEA cases without filing individual "charges" with the EEOC. To the contrary, Congress specifically noted that "[t]his change . . . is not intended to alter the basic purpose of the notice requirement. . . . " H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 12 (1978) *reprinted in* 1978 U.S.C.C.A.N. 528, 534.

The Eleventh Circuit's decision allowing a series of individual, disparate treatment claims to be added to this case without ever having been presented to the EEOC also conflicts with the *Thomure* decision, in which the Eighth Circuit refused to allow one plaintiff alleging discrimination arising out of a one-time pay cut to "piggyback" onto the charge of another plaintiff. In contrast to *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977), which allowed "piggybacking" in the context of a class-wide, continuing violation claim attacking a discriminatory seniority system, the *Thomure* court recognized that individual employment decisions are "not the sort of continuing violation found in *Allen* for which one presumably could always file a charge as long as the violation continued." *Thomure*, 30 F.3d at 1027. Here, as in *Thomure*, the demotions at issue were one-time, discrete events that do not constitute a continuing violation. *See Ricks, supra; Evans, supra.* Accordingly, only those plaintiffs who filed timely charges of discrimination should be permitted to join the case.

Furthermore, even assuming that the single-filing rule should apply to opt-in class actions under the ADEA, the charge upon which the opt-in plaintiffs rely must provide sufficient notice of class-wide discrimination to allow investigation and conciliation by the EEOC. Although the Eleventh Circuit had not addressed this issue in an ADEA case previously, the Fifth Circuit has ruled that to be the foundation for a class action, a charge must allege class-wide discrimination or that it was filed on behalf of a class. *Anson*, 962 F.2d at 541-543; *accord, Kloos v. Carter-Day Co.*, 799 F.2d 397, 402 (8th Cir. 1986).

Similarly, the Ninth Circuit has held that a lawsuit filed by a plaintiff whose administrative charge "expressed no intention to sue on behalf of anyone other than himself" could not form the basis for an "opt in" class action. *Naton v. Bank of California*, 649 F.2d 691, 697 (9th Cir. 1981).

The Eleventh Circuit Court of Appeals instructed the district court to rely on the charge of plaintiff Kempton, but even the Eleventh Circuit did not find that this charge gave adequate notice of "class action" claims when read alone. The Panel held that "Kempton's charge, *read together with the charges of the other named Helton plaintiffs*, provides adequate notice." (App., pp. 41-42) (emphasis added). Where, as here, none of these claimants gave notice that they sought to represent a class, and the EEOC did not conduct any class-wide investigation of the charging parties' claims, the Court should not permit a class action to proceed.[10]

The interests served by the charge-filing requirement would be severely and inappropriately compromised if large numbers of non-charge-filing plaintiffs were allowed to add their *separate*, disparate treatment claims to this case. Unlike the cases in other jurisdictions that

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[10] It is undisputed that there was no "class-wide" investigation or conciliation of the named plaintiffs' claims. Indeed, the record reflects that the only determination issued by the EEOC on any charge filed by the *Helton* (or *Grayson*) plaintiffs was a determination of "no cause" on the charge filed by plaintiff Williams. The Eleventh Circuit noted that the Williams charge referenced the demotion of "six other store managers," but failed to mention the EEOC determination rejecting the charge as meritless. (App., pp. 49-50).

have sanctioned "piggybacking," the charges filed by the *Helton* plaintiffs were not filed or investigated by the EEOC on a class-wide basis, and plaintiffs here do not have any basis to assert a "continuing violation" claim based on a series of discrete demotions affecting them individually. "Piggybacking" is not appropriate here, and the writ should be granted to resolve, the conflicting decisions about when, if ever, "piggybacking" should be allowed.

CONCLUSION

The writ should issue to consider whether or not the "similarly situated" language incorporated in the ADEA permits a disparate treatment case involving five plaintiffs to be converted to an opt-in class action after the close of discovery when a full factual record shows that individual claims predominate and that a multi-plaintiff trial would be impossible to manage in a fair and meaningful way. This Court has never considered this important issue, and the previous ruling in *Sperling* has led to conflicts between the Circuits on important issues that warrant review and clarification on certiorari. The conflicts between the Circuits on the "piggybacking" issue also presents a matter of first impression that should be addressed by this Court. For the reasons expressed

herein, the writ should issue to review the questions addressed above.

Respectfully submitted,

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APPENDIX

Mercer David GRAYSON, Plaintiff-Appellee, Cross-Appellant,

v.

K MART CORPORATION, Defendant-Appellant, Cross-Appellee.

Ronald L. BRALEY, Plaintiff-Appellee, Cross-Appellant,

v.

K MART CORPORATION, Defendant-Appellant, Cross-Appellee.

Tony M. ARRINGTON, Plaintiff-Appellee, Cross-Appellant,

v.

K MART CORPORATION, Defendant-Appellant, Cross-Appellee.

Ricky D. SALLEE, Plaintiff-Appellee, Cross-Appellant,

v.

K MART CORPORATION, Defendant-Appellant, Cross-Appellee.

James L. STEADMAN, Plaintiff-Appellee, Cross-Appellant,

v.

K MART CORPORATION, Defendant-Appellant, Cross-Appellee.

John D. THOMPSON, Plaintiff-Appellee, Cross-Appellant,

v.

K MART CORPORATION, Defendant-Appellant, Cross-Appellee.

Obediah SCONIERS, et al., Movants,

Carl Helton, Charles W. Kempton, James E. Taylor, Bob Williams, David Jack Wright, Plaintiffs-Appellees,

v.

K MART CORPORATION, Defendant-Appellant.

Nos. 94-9257, 94-9293.

United States Court of Appeals,
Eleventh Circuit.

April 9, 1996.

Terminated and demoted store managers brought age discrimination actions against employer. The United States District Court for the Northern District of Georgia, Nos. 1:92-CV-141, 94-457, 94-458, 94-463, 94-464, 94-466-JEC, Julie E. Carnes, J., granted employer's motion to sever claims of 11 plaintiffs who had joined to bring one action and entered a conditional order of dismissal, and No. 1:92-CV-2546, Marvin H. Shoob, J., in the other action, rejected employer's motion for severance and granted motions to create opt-in class. Cross-appeals were taken. The Court of Appeals, Garth, Senior Circuit Judge, sitting by designation, held that: (1) dismissal order was not a final, appealable order; (2) plaintiffs met burden of showing class-wide discrimination permitting them to opt-in to other class action; (3) piggybacking rule

applies to ADEA classes; (4) district judge should have chosen first timely filed charge of one of named plaintiffs that gave adequate notice of scope of class for application of piggybacking rule; (5) putative plaintiff must file written consent to opt into class action prior to expiration of statute of limitations on ADEA claims; and (6) underlying EEOC charge gave adequate notice of "class-wide" discrimination for purposes of applying piggyback concept.

Affirmed in part, and reversed and remanded in part.

James H. Coil, III, Edmund M. Kneisel, Walter E. Johnson, Kilpatrick & Cody, Atlanta, GA, for appellants.

Douglas S. McDowell, McGuiness & Williams, Washington, DC, for amicus.

Daniel M. Klein, Green, Buckley, Jones & McQueen, Atlanta, GA, James Lee Ford, Ford & Felton, Atlanta, GA, for appellees.

Appeals from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, Chief Judge, and DYER and GARTH[1], Senior Circuit Judges.

GARTH, Senior Circuit Judge:

The plaintiffs in the *Grayson* and *Helton* actions (together "the plaintiffs") are store managers in K Mart's Southern Region who were demoted or terminated by K Mart during the period from 1990 to 1992. The plaintiffs

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[1] Honorable Leonard I. Garth, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

allege that their demotions or terminations were motivated by age-discrimination in violation of the Age Discrimination in Employment Act of 1967. 29 U.S.C. § 621 *et seq.* (the "ADEA"). The *Grayson* action was commenced on January 17, 1992 before District Court Judge Julie Carnes in the Northern District of Georgia. The *Helton* action was commenced on October 29, 1992 before District Court Judge Marvin Shoob, also in the Northern District of Georgia.

Judge Shoob certified for interlocutory appeal, his July 21, 1994 Order allowing the creation of an ADEA opt-in class under 29 U.S.C. § 216(b). For the reasons stated *infra*, we will affirm Judge Shoob's July 21, 1994 Order insofar as it creates an opt-in joinder class, but we will reverse and remand for redetermination of the temporal scope of the class. We also will dismiss K Mart's appeal of Judge Carnes' order of October 28, 1994 which had dismissed the *Grayson* actions without prejudice. We do so because we lack appellate jurisdiction over an order which we here hold to be non-final and hence, not appealable.

I. Background

K Mart's Southern Region covers approximately 700 stores in eighteen states, Puerto Rico, and the Virgin Islands. The Southern Region is subdivided into five "sub-regions," each of which is headed by a Region Manager. Each "sub-region" is divided into districts of about ten to sixteen stores, and each district has its own District Manager.

In 1987, when Joseph Antonini became President, CEO, and Chairman of K Mart, he began a program of company restructuring called the "Renewal Program," aimed at creating a "new image" for K Mart. The plaintiffs allege that as part of K Mart's "new image," Antonini sought more youthful store managers. This goal, the plaintiffs allege, was shared by other high-level managers, particularly Don Keeble, K Mart's director of nationwide store operations; Tom Watkins, K Mart's Senior Vice President of Store Operations; John Valenti, K Mart's Regional Vice President of the Southern Region; and Robert McAllister, Valenti's predecessor as the Southern Regional Vice President.

In early 1990, Watkins instructed Robert McAllister, Valenti's predecessor as the Southern Regional Vice President, to prepare a listing of all of the managers in K Mart's Southern Region who had been rated "Needs Improvement" in 1989. Each manager's age and pay were listed, as well as the action the company had taken or was planning to take with respect to that manager. In March of 1990, McAllister sent Watkins the requested chart. Each "Below Expectations" manager under the age of thirty-nine was scheduled to be re-appraised in the near future without explanation. Most of the managers around the age of forty were demoted. Six of the eight managers over the age of forty-five were slated for demotion.

Valenti became Southern Regional Vice President soon after this time. From 1990 through 1992, K Mart demoted 151 Southern Region Store Managers, and approximately 76 additional store managers resigned. Each of the *Grayson* and *Helton* plaintiffs received "Commendable" or "Competent" annual evaluations for the

years preceding this period of time. Thereafter, they started receiving "Needs Improvement," "Below Expectations," or "Unsatisfactory" evaluations.

The plaintiffs allege that K Mart "built a case" or "built a file" against each store manager before demoting him. Specifically, the plaintiffs allege that when K Mart targeted an older store manager for demotion, it would relentlessly criticize him for matters that were consistently overlooked for younger managers; or K Mart would assign the targeted manager unachievable goals, only to criticize him when those goals were not reached. This "building a case" demotion process, the plaintiffs contend, was centrally planned, monitored, and coordinated.

K Mart denies that the demotions were motivated by age discrimination. K Mart alleges that each demotion decision was based on the individual performance of the store manager in question, as judged by the store's operating results, general physical appearance, and compliance with K Mart company policies. Further, K Mart argues that the plaintiffs have failed to produce any evidence to show that any evaluation about the operations of their stores was false or prepared for age-biased reasons. K Mart also argues that there is no evidence that younger managers were treated any differently from older managers. Indeed, according to K Mart, the average age of store managers and the average earnings of older store managers increased slightly in the three sub-regions where the plaintiffs were employed. K Mart also denies that the demotions were centrally planned, noting that with few exceptions, the plaintiffs were each demoted by different Region Managers.

On January 17, 1992, Mercer Grayson and ten other plaintiffs (the *"Grayson"* plaintiffs) from Alabama, Florida, Georgia, and North Carolina filed a complaint in the Northern District of Georgia, alleging that they had each been demoted or terminated within a few months after the end of K Mart's 1990 fiscal year based on age discrimination in violation of the ADEA. Each plaintiff also claimed intentional infliction of emotional distress under their respective state laws. In their complaint, the *Grayson* plaintiffs stated that they filed the action on behalf of "other employees or former employees who may be similarly situated." This case was assigned to District Court Judge Julie Carnes.

On October 29, 1992, Carl Helton and four other plaintiffs (the *"Helton"* plaintiffs) filed a similar complaint, also in the Northern District of Georgia, alleging that they had been demoted in violation of the ADEA during or after the end of K Mart's 1991 fiscal year. The *Helton* plaintiffs did not allege or suggest that their case should be treated as a class action. The *Helton* plaintiffs did not designate their case as being related to the *Grayson* case on the civil intake questionnaire, so the *Helton* case was assigned to a different judge: District Court Judge Marvin Shoob.[2] The plaintiffs in both cases engaged in parallel discovery.

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[2] We look with disfavor upon the commencement of two separate actions which assert essentially the same cause of action based on essentially the same facts and legal theories, before two different judges. This is particularly egregious where, as here, the same counsel represented both the *Grayson* and *Helton* plaintiffs in both actions.

On February 16, 1993, K Mart moved for severance in the *Helton* case under Federal Rule of Civil Procedure 42(b), arguing that the claims of the five *Helton* plaintiffs were not properly joined under Federal Rule of Civil Procedure 20.

On March 17, 1993, after the end of the scheduled discovery period in *Grayson*, K Mart filed in the *Grayson* case, a (1) a motion for summary judgment with respect to the claims of each of the eleven plaintiffs; (2) a motion for severance under Rule 42(b), arguing that the claims of the eleven plaintiffs were not properly joined under Rule 20; and (3) a motion to transfer the claims of five plaintiffs who lived and worked in Florida and North Carolina to district courts in those states.

On September 30, 1993, Judge Shoob rejected K Mart's motion for severance in the *Helton* case.

Discovery was completed in both cases shortly after January 25, 1994.

On February 22, 1994, Judge Carnes granted K Mart's severance motion in the *Grayson* case, ruling that the claims of the eleven plaintiffs were not properly joined under Federal Rule of Civil Procedure 20 and that the claims should be severed into eleven separate cases under Federal Rule of Civil Procedure 42(b).

On March 1, 1994, after Judge Carnes had granted K Mart's severance motion, the *Grayson* plaintiffs withdrew their objections to transfer. At the same time, Judge Carnes issued a Transfer Order dated February 25, 1994.

On February 28, 1994, the *Helton* plaintiffs filed: (1) a motion seeking leave to amend their complaint to allege

for the first time an ADEA "class action" under 29 U.S.C. § 216(b); (2) a motion for leave to amend the complaint to add that the action is brought on behalf of other similarly situated individuals; and (3) a motion for leave to send notice of the case to other "unnamed" potential class members to advise them that they could "opt-in" as plaintiffs in the case pursuant to 29 U.S.C. § 216(b).

K Mart opposed the *Helton* plaintiffs' motions and renewed its motion to sever the *Helton* claims among the five plaintiffs.

By Order filed July 21, 1994, Judge Shoob granted the *Helton* plaintiffs' February 28, 1994 motions to create an opt-in class under 29 U.S.C. § 216(b) and to amend their complaint. Judge Shoob denied K Mart's renewed motion to sever.

After transferring to other district courts the complaints of five of the *Grayson* plaintiffs, Judge Carnes, on August 23, 1994, *sua sponte* issued a conditional order dismissing without prejudice each of the six severed actions remaining in the *Grayson* case. In so doing, Judge Carnes noted that all of the *Grayson* plaintiffs were members of the *Helton* class and assumed that those plaintiffs would wish to opt in to the *Helton* case. As a condition of these dismissals, Judge Carnes provided that the six *Grayson* plaintiffs could reopen their cases if they were later excluded from the *Helton* case.

On September 9, 1994, K Mart filed a motion for reconsideration of Judge Carnes' August 23, 1994 ruling in *Grayson*, arguing that the dismissal (1) caused significant prejudice to K Mart; (2) was inconsistent with the law of the case, and (3) was improper under Federal Rule

of Civil Procedure 41(a). K Mart moved for Judge Carnes to certify an interlocutory appeal of the August 23, 1994 dismissal order under 28 U.S.C. § 1292(b).

On October 17, 1994, the *Helton* plaintiffs amended their complaint to specify that their action was being brought on behalf of both the named plaintiffs and others "similarly situated" under 29 U.S.C. § 216(b).

By Order entered October 28, 1994, Judge Carnes denied K Mart's motion for reconsideration and refused to certify an interlocutory appeal of the August 23, 1994 dismissal order. In addition, in an effort to frame her initial dismissal order as a final appealable order, Judge Carnes, by another Order entered October 28, 1994, sought to remove all contingencies in the dismissal order.

Thereafter, the six remaining *Grayson* plaintiffs purported to opt-in as plaintiffs in *Helton*. Further, the five former *Grayson* plaintiffs, whose claims had been severed and transferred to other jurisdictions, filed opt-in notices in *Helton*. Two of those former *Grayson* plaintiffs were allowed to "re-transfer" their cases back to the Northern District of Georgia. The other three former *Grayson* plaintiffs' cases have been stayed pending disposition of the opt-in claims in *Helton*. K Mart had opposed all five transfer motions with a "law of the case" argument. Every district court presiding over one of those former *Grayson* cases rejected that argument.[3]

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[3] In one of these cases, plaintiff Kenneth Bell's case was transferred from the Middle District of Florida, to Judge Shoob, and K Mart asked Judge Shoob to retransfer the case back, based on the "law of the case." Judge Shoob denied K Mart's motion,

On October 12, 1994, Judge Shoob certified the July 21, 1994 "class action" ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). In certifying the July 21, 1994 Order for interlocutory appeal, Judge Shoob listed five specific questions:

(1) Whether the "similarly situated" requirement of 29 U.S.C. § 216(b) is essentially the same as the requirement for joinder of additional plaintiffs under Fed.R.Civ.P. 20 and 42.[4]

(2) Whether the "similarly situated" requirement of § 216(b) requires the court to find a unified policy, plan or scheme of discrimination by the defendant before an "opt-in" class action may be maintained.

(3) Whether this Court allows potential class members who had not filed a timely administrative claim to rely on timely filed charges filed by representative plaintiffs alleging "class-wide discrimination."

(4) Whether the EEOC charges filed by the representative plaintiffs in this action gave

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stating that "the Court does not agree that the retransfer decision [by Judge Schlesinger] is inconsistent with 'the law of the case.' " K Mart petitioned for writ of mandamus on this issue. On November 18, 1994, the Eleventh Circuit denied the petition for mandamus.

[4] In the Order certifying issues for interlocutory appeal, it appears to us that "2" and "4" were transposed so that the Order reads Rule "24" instead of "42." This is undoubtedly a typographical error, since Rule 24 (intervention) has no application or relevance to this case, while Rule 42 (separate trials) is one of the grounds upon which Judge Carnes based her severance motion.

adequate notice of "class-wide" discrimination for purposes of the single-filing ("piggybacking") rule.

(5) Whether an evidentiary hearing must have been first conducted, before the court certified the class pursuant to 29 U.S.C. § 216(b).

On November 18, 1994, this Court granted K Mart's petition for leave to appeal Judge Shoob's July 21, 1994 interlocutory order. By Order filed June 7, 1995, Judge Shoob granted the EEOC's motion to intervene in the *Helton* case.

II. Judge Carnes' Dismissal Order in *Grayson*

We turn first to the appeal taken by K Mart from the order entered by Judge Carnes on October 28, 1994, which dismissed the six remaining *Grayson* plaintiffs without prejudice. K Mart appeals, urging us to reverse Judge Carnes' dismissal order. We reject K Mart's argument because we are convinced that Judge Carnes' order, though fashioned to be an appealable order, was in effect non-final. As such, we lack appellate jurisdiction to entertain K Mart's appeal from her order, 28 U.S.C. § 1291, and we dismiss K Mart's appeal. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80, 101 S.Ct. 669, 676, 66 L.Ed.2d 571 (1981).[5]

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[5] Neither party has raised the issue of appealability, but we have the obligation ourselves to do so. *See Finn v. Prudential-Bache Securities, Inc.*, 821 F.2d 581, 584-85 (11th Cir.1987), *cert. denied*, 488 U.S. 917, 109 S.Ct. 274, 102 L.Ed.2d 262 (1988).

Judge Carnes *sua sponte* dismissed without prejudice the six remaining actions in the *Grayson* case on August 23, 1994, with the express intention of allowing the *Grayson* plaintiffs to opt into the *Helton* case. At the same time, and as a condition of those dismissals, Judge Carnes provided that the six *Grayson* plaintiffs could reopen their cases before her if they were later excluded from the *Helton* case as "opt-ins." On October 28, 1994, Judge Carnes reframed her order dismissing the *Grayson* actions without prejudice, but this time she did not qualify the dismissal order with any conditions. It is this latter dismissal order from which K Mart appeals.[6]

We hold that the October 28, 1994 order dismissing the *Grayson* actions without prejudice was in effect a transfer order which was non-final in nature and thus not appealable.[7]

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[6] The October 28, 1994 dismissal order provides: "This action having come before the court, Honorable Julie E. Carnes, United States District Judge for consideration of plaintiffs oral motion to dismiss, and the court having granted motion, it is Ordered and Adjudged that the action is hereby dismissed without prejudice."

[7] A dismissal "without prejudice" refers to the fact that the dismissal is not on the merits, not whether the dismissal is final and appealable. *See* 9 Moore Federal Practice ¶ 110.13[1] n. 30. Thus, although dismissals without prejudice may be appealable, *Liberty Nat'l Ins. Holding Co. v. The Charter Co.*, 734 F.2d 545, 553 n. 18 (11th Cir.1984), they are only appealable if they are "final orders." Dismissals that are without prejudice to refiling are not "final" for purposes of appeal. *See Jung v. K & D Mining Co.*, 356 U.S. 335, 78 S.Ct. 764, 2 L.Ed.2d 806 (1958) (dismissal of a complaint with leave to file an amended complaint is not a "final" and "appealable" order); *Mesa v. United States*, 61 F.3d 20, 22 (11th Cir.1995) (where district court had dismissed some

It is well settled that a transfer order is not appealable as a final order under 28 U.S.C. § 1291. *E.g., Alimenta (USA) Inc. v. Lyng*, 872 F.2d 382, 385 (11th Cir.1989) (holding that the district court's order transferring the case to the claims court was not a final order and thus not appealable); *Dobard v. Johnson*, 749 F.2d 1503, 1506 (11th Cir.1985) (holding that there was no appellate jurisdiction over district court's transfer order under 28 U.S.C. § 2241 and noting that "courts have fairly consistently held that transfer orders brought under other statutes are not generally final orders for the purpose of appeal").[8]

In this case the dismissal order was not "final," because the parties stipulated on the record that the *Grayson* plaintiffs may refile their action if they are barred from opting into the *Helton* case. *See* Plaintiffs' Initial Brief at 53-55 (citing to Status Conference before the Honorable Julie Carnes, October 25, 1994, at 44-47, 49-50, 56-58, 84). That colloquy shows clearly the intent of the district court and the parties to fashion an appealable, final order, even though the underlying conditions of the

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but not all claims and plaintiffs, seeking an immediate appeal of the one dismissed claim, voluntarily dismissed remaining claims without prejudice, the voluntary dismissal could not be considered final, and thus was not appealable, because it was without prejudice to plaintiffs' refiling of those claims).

[8] Transfer orders are reviewable, however, via alternative routes such as by writ of mandamus, *see Roofing & Sheet Metal Serv. v. La Quinta Motor Inns*, 689 F.2d 982, 987 (11th Cir.1982). However, K Mart does not argue that Judge Carnes' October 28, 1994 order is reviewable on any grounds other than as a final order.

original August 23, 1994 Order were implicit in the October 28, 1994 Order as fashioned. *Id.*[9] We agree with the plaintiffs' contention that the dismissal order was in effect a transfer order. Plaintiffs' Initial Brief at 55.

We find the Tenth Circuit's decision in *Facteau v. Sullivan*, 843 F.2d 1318 (10th Cir.1988) particularly instructive. Arthur Facteau, an inmate, had brought a civil rights action seeking modification of a New Mexico state penitentiary policy regarding body cavity searches. *Id.* at 1318. The district court dismissed Facteau's suit as barred by an ongoing class action on behalf of all inmates over conditions at the same prison, and it referred Facteau's claims to the class action. *Id.* The Tenth Circuit construed the district court's order as a dismissal without prejudice

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[9] While we are not certain that the record on appeal before us contains the colloquy which Judge Carnes had with counsel for Grayson and K Mart, inasmuch as the agreed-upon record, *see* note 14, *infra*, makes no reference to this transcript, we nonetheless have read that colloquy because it appears at length in the plaintiffs' initial brief on appeal. K Mart has not taken exception to the accuracy of the plaintiffs' quotation of the transcript of the hearing; indeed it could not take exception inasmuch as K Mart participated in the hearing and indeed urged Judge Carnes to modify her original dismissal order of August 23, 1994 so as to qualify her order for appeal to this Court.

K Mart argues only that plaintiffs' quotation from the transcript of that status hearing is incomplete because it failed to include, most relevantly, a colloquy showing that Judge Carnes denied the plaintiffs' request for transfer. We are satisfied, for the reasons stated *supra*, that even though Judge Carnes did not formally order transfer of the *Grayson* actions to the *Helton* class action, her order of dismissal without prejudice had the exact same effect.

to refiling in the event that Facteau's claims were rejected as outside the scope of the class action. *Id.* The Tenth Circuit then found that the district court's order, which effected a transfer, was neither final nor appealable. *Id.* at 1319. That court reasoned:

> The critical determination is whether plaintiff has been effectively excluded from federal court under the present circumstances. We believe he has not. If plaintiff's allegations fall within the scope of the *Duran* [class action] litigation, he will have his claim decided by the *Duran* district court; if plaintiff's allegations fall outside the parameters of *Duran*, he may be transferred back to the original transferor court for reinstatement of his suit or he may simply refile on his own. In either case, plaintiff will have his day in federal district court, with the opportunity to appeal, if necessary.

Id. at 1319-20. Similarly, in the present case, Judge Carnes' dismissal of the *Grayson* actions without prejudice is in effect a transfer of those cases to the *Helton* class action litigation, that would allow the *Grayson* plaintiffs to refile their claims before Judge Carnes in the event that they are not permitted to opt into the *Helton* class. Therefore, Judge Carnes' October 28, 1994 order is not final, and we DISMISS K Mart's appeal of that order for lack of appellate jurisdiction.[10]

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[10] In addition, we question whether K Mart is an aggrieved party with standing to challenge Judge Carnes' October 28, 1994 order dismissing the *Grayson* actions without prejudice. If K Mart had challenged that order on the ground that the dismissal should have been *with* prejudice, we may well have concluded that K Mart had standing to appeal. *See Kirkland v. Nat'l*

III. Judge Shoob's § 216(b) Order

The issues identified by Judge Shoob, in certifying his July 21, 1994 Order[11] for interlocutory appeal, are understandably closely related. Indeed, some of the issues necessarily overlap and, as a consequence, our rulings with respect to them overlap as well. Essentially we hold that the "similarly situated" requirement of § 216(b) is more elastic and less stringent than the requirements found in Rule 20 (joinder) and Rule 42 (severance). We also hold that a unified policy, plan, or scheme of discrimination may not be required to satisfy the more liberal "similarly situated" requirement of § 216(b), even though in the instant case, we are persuaded that the allegations, affidavits, and depositions meet a standard of greater stringency than the "similarly situated" standard found in § 216(b). Indeed in this case, the record is more than sufficient to meet either standard.

We also hold that potential class members who had not filed a timely administrative claim if they otherwise had met the opt-in requirements which we specify in this opinion, may rely on timely filed charges by the original class plaintiffs who have filed timely charges. Finally, we

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Mortgage Network, Inc., 884 F.2d 1367, 1369 (11th Cir.1989); *see also Disher v. Information Resources, Inc.*, 873 F.2d 136, 139 (7th Cir.1989). However, in this case, K Mart is not asking for a dismissal with prejudice but instead seeks to return to Judge Carnes' court and to resume litigating the severed *Grayson* cases individually. In effect, K Mart is seeking to restore to Judge Carnes' court for trial, a phalanx of individual cases, each of which would be litigated in place of trying a class action.

[11] We have annexed as an exhibit to this opinion, Judge Shoob's July 21, 1994 order.

conclude that no evidentiary hearing had to be conducted by the district court prior to certifying the § 216(b) class and that piggybacking may be employed where the requirements we have established for notice of classwide discrimination have been met.

A.

In undertaking our review of Judge Shoob's July 21, 1994 Order in the *Helton* case permitting opt-in joinder of "similarly situated" plaintiffs pursuant to 29 U.S.C. § 216(b), we review not only the specific issues identified by the district court, but also the order as a whole. *See Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 40 F.3d 1202, 1208 (11th Cir.1994) (recognizing that certification under § 1292(b) brings the district court's entire order before the appellate court on interlocutory appeal), *cert. den.*, ___ U.S. ___, 116 S.Ct. 565, 133 L.Ed.2d 490 (1995).

Section 7(b) of the ADEA (codified at 29 U.S.C. § 626(b)) incorporates the opt-in class action provision of the Fair Labor Standards Act (codified at 29 U.S.C. § 216(b)). Section 216(b) provides that:

> An action to recover the liability prescribed . . . may be maintained against any employer in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and *other employees similarly situated.* No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a

> party and such consent is filed in the court in which such action is brought. . . .

29 U.S.C. § 216(b) (1995) (emphasis added).

For an opt-in class to be created under section 216(b), an employee need only show that he is suing his employer for himself and on behalf of other employees "similarly situated." "[P]laintiffs need show only 'that their positions are similar, not identical,' to the positions held by the putative class members." *Sperling v. Hoffmann-LaRoche*, 118 F.R.D. 392, 407 (D.N.J.1988), *aff'd in part and appeal dismissed in part*, 862 F.2d 439 (3d Cir.1988), *aff'd, Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989)); *see Howard Eglit*, 1 *Age Discrimination* § 6.50 at 6-305 (2d ed. 1994). Furthermore, "Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively." *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170, 110 S.Ct. 482, 486, 107 L.Ed.2d 480 (1989).

We hold that section 216(b)'s "similarly situated" requirement is less stringent than that for joinder under Rule 20(a) or for separate trials under Rule 42(b). *See Flavel v. Svedala Indus. Inc.*, 875 F.Supp. 550, 553 (E.D.W.s.1994) ("The 'similarly situated' requirement, in turn, 'is considerably less stringent than the requirement of [Rule 23(b)(3)] that common questions 'predominate,' or presumably, the Rule 20(a) requirement that claims 'arise out of the same action or occurrence.' ").[12]

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[12] Although not at issue in this case, it is clear that the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class

K Mart argues that Judge Shoob violated principles of comity in creating a § 216(b) opt-in joinder class in *Helton*, given that Judge Carnes had previously severed the *Grayson* action pursuant to Rules 20 and 42 of the Rules of Civil Procedure.[13] In interpreting the Rules, we exercise *de novo* review. *See Burns v. Lawther*, 53 F.3d 1237, 1240 (11th Cir.1995) (interpretation of federal rules of civil procedure is a question of law subject to *de novo* review).

We recognize that Judge Shoob, in certifying a class under § 216(b), was ruling on a different issue with different standards than those on which Judge Carnes ruled. In granting severance in *Grayson*, Judge Carnes relied on Rules 20(a) and 42(b) of the Federal Rules of Civil Procedure. Rule 20(a) provides for permissive joinder where there exist (1) a "right to relief . . . arising out of the same transaction [and] occurrence," and (2) "common questions of fact or law" as required under Rule 20(a). Rule 42(b) provides for separate trials where the efficiency of a consolidated trial was outweighed by its potential prejudice. Fed.R.Civ.Proc. 42(b). In contrast, Judge Shoob created the *Helton* opt-in class pursuant to 29 U.S.C. § 216(b).

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action under Rule 23 of the Federal Rules of Civil Procedure. *See e.g. LaChapelle v. Owens Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir.1975) (Rule 23 and § 216(b) actions are "mutually exclusive and irreconcilable").

[13] The "comity" asserted by K Mart strikes us as most dubious in light of the fact that Judge Shoob had denied severance in *Helton* prior in time to Judge Carnes' grant of severance in *Grayson*. *See* note 18, *infra*.

As a consequence, and despite K Mart's argument that Judge Shoob violated principles of "comity," we conclude that Judge Shoob did not trench upon any principles of "comity" when he made his § 216(b) ruling, because, among other things, the standard for allowing an opt-in joinder class under § 216(b) differs from, and is more lenient than, the standards for joinder and severance under Rules 20(a) and 42(b), respectively, of the Federal Rules of Civil Procedure.

B.

K Mart alleges that Judge Shoob erred in allowing the *Helton* plaintiffs to create an opt-in ADEA class under 29 U.S.C. § 216(b). We review Judge Shoob's ruling for abuse of discretion. *Van Poyck v. Singletary,* 11 F.3d 146, 148 (11th Cir.1994) (district court's ruling on class certification). We hold that Judge Shoob acted within his discretion in allowing a § 216(b) opt-in class in *Helton,* because the plaintiffs have made substantial allegations and provided evidentiary support for their contention that they were victims of an age-motivated purge in K Mart's Southern Region from 1990 to 1992.

The plaintiffs bear the burden of demonstrating a "reasonable basis" for their claim of class-wide discrimination. *See Haynes v. Singer Co., Inc.,* 696 F.2d 884, 887 (11th Cir.1983). The plaintiffs may meet this burden, which is not heavy, by making substantial allegations of class-wide discrimination, that is, detailed allegations supported by affidavits which "successfully engage

defendants' affidavits to the contrary." *Sperling v. Hoffmann-LaRoche*, 118 F.R.D. at 406-07.[14]

The plaintiffs' statistical expert, Leonard Cupingood, stated in his affidavit that because of the hiring and termination decisions of K Mart, 57.1% of the store manager workforce were over forty years old in December 1992, in contrast to the 74.2% that would have been in place in the absence of K Mart's hiring and termination decisions. (Cupingood Aff. at 6) (HR-104, Ex. 5). Thus, Cupingood concluded that "the disparity between the actual and expected number of older store managers who were demoted is statistically significant" for the period between January 1, 1990 and December 31, 1992. (Cupingood Aff. at 3).[15]

The evidence before Judge Shoob also showed that K Mart decisionmakers, from the Southern Region's Vice President up to K Mart's CEO, expressed their intent to purge K Mart of older managers. Joseph Antonini, who became President, CEO, and Chairman of K Mart in 1987, acknowledged at deposition that he had undertaken a "program to renew" K Mart's image. (Antonini Dep. at 31) (HR-104, Ex. 4). On October 10, 1989, Antonini gave a

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[14] At oral argument, the Court, concerned as to what constituted the record before us on appeal, asked that counsel agree on a joint statement of the record on appeal.

[15] Cupingold's analysis was based on the statistical information submitted to date by K Mart, which included figures for one-half of the Southern Region. (Pl's Initial Brief at 15).

press briefing on "K Mart's present and future direction," in which he reported that:

> K Mart has one of the youngest and most aggressive management teams in retailing today. The average age of the 32-person corporate officer group is less than 50 years old with an average retail experience exceeding 22 years. Our store managers average 15 years service in our company. K Mart is confident that the team in place will move the company forward.

(Transcript of Remarks of J.E. Antonini at Press Briefing of Oct. 10, 1989, at 3) (HR-104, Ex. 4). Antonini had made similar comments in a speech on September 12, 1990, that was broadcast over K Mart's satellite network. (Antonini Dep. at 30). He testified that he was "proud" of the management team because they "had a lot of experience and a lot of longevity left." (Antonini Dep. at 39).

Don Keeble, K Mart's director of nationwide store operations made similar remarks. According to third parties who had dealt with Keeble in negotiating contracts for the cleaning of K Mart's stores, Keeble said that K Mart was " 'working to change its image,' " and wanted its stores to " 'have a fresher, cleaner, and younger look.' " (Powers Aff. at 2) (HR-104, Ex. 3). Keebles also said that the " 'problem' " that K Mart had with its older store managers was that they " 'were accustomed to the old way of doing things,' " but that he " 'didn't want to re-educate these people, because they still wouldn't fit into the spirit of the new image that he and Mr. Antonini wanted;' " *id.*, that " 'K Mart was promoting a younger image in management,' " (Marzano Aff. at 2), and that K

Mart had a lot of " 'old wood' " that was really " 'dead wood.' " *Id.* at 3.

Similarly, prior to becoming K Mart's Southern Regional Vice President, John Valenti said: "That's the trouble with K Mart. It's these older store managers. But we are planning to do something about it." (Marzano Supp.Aff. at 3) (HR-104, Ex. 2). Furthermore, the plaintiffs allege that after John Valenti became K Mart's Regional Vice President of the Southern Region, the job performance evaluations of the older store managers nearly all dropped from "Competent" or "Commendable" to "Needs Improvement," "Unsatisfactory," or "Below Expectations," while there was no similar downgrading of younger store managers' performances. (Pl's Initial Brief at 14-17). Indeed, the chart which Robert McAllister, Valenti's predecessor as Southern Region Vice President, created at the instruction of Tom Watkins, K Mart's Senior Vice President of Store Operations, reveals that every manager under the age of thirty-nine who had been rated "Below Expectations" was scheduled to be reappraised in the near future, while six of the eight of the managers over the age forty-five who had been rated "Below Expectations" was demoted or resigned. (Summary Chart, Mar. 23, 1990) (HR-104, Ex. 26).

The plaintiffs further allege that K Mart targeted older store managers for criticism and built a paper trail that would be grounds for their demotion. On November 1, 1985, McAllister and another Region Manager, Clifton, sent a confidential memorandum to all district managers notifying them that a new store management structure would "most probably" be in place in the near future,

and instructing them to begin "building a case" to terminate low performing Resident Assistant [store] managers. (Confidential Mem. from McAllister and Clifton to District Managers, Nov. 1, 1985) (HR-104, Ex. 26). In 1988, Valenti assured David Marzano, who had contracted to clean K Mart's stores, that if Marzano encountered any problems with the older store managers, he, Valenti, would "build a file" on that manager. (Marzano Supp.Aff. at 3) (HR-104, Ex. 2). Charles Wester, a Southern Region Loss Prevention District Manager, testified that he was criticized by Valenti for not having done more to build cases against older store managers. (Wester Dep. at 264) (HR-104, Ex. 49).

W.A. Sands, a demoted K Mart store manager, states in his affidavit that K Mart, in "building a case" against a targeted older manager, would assign the manager unachievable goals, give the manager negative reviews when the goals were not met, and then use the negative reviews to remove the manager from his position. (Sands Aff. at 3) (HR-104, Ex. 42).

Wester, in his affidavit, states that K Mart would also build a case against a targeted older manager by "relentlessly criticiz[ing] him, complaining about matters that were routinely overlooked for younger managers." (Wester Aff. at 2) (HR-104, Ex. 15). In particular, the older store manager would be heavily criticized for "invisible waste"[16] and other loss prevention matters. *Id.* During a

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[16] "Invisible waste" refers to the difference between the store's record of inventory and the actual inventory in stock, to theft and bookkeeping errors. (Lynch Dep. at 90-91) (HR-104, Ex. 25).

visit to a K Mart store in Florida, Valenti told Wester and several other managers to be tougher on older store managers to reduce the "invisible waste." (Wester Dep. at 264-65). Virtually all of the district managers urged Wester to find certain deficiencies during his inspection of certain stores. (Wester Aff. at 3).

The district managers also conducted store inspections when the targeted older store manager was not scheduled to be at the store. *Id.* One district manager, Boes, told Wester that he was going to continue the pressure on several of his older store managers by making night visits and visits on their days off so that they would be afraid to leave their stores. *Id.* Wester testified that despite its relentless criticism of older managers for "invisible waste," K Mart ignored his recommendation to obtain security camera systems or to supply additional personnel to assist the stores run by older store managers in neighborhoods that were particularly susceptible to shoplifting. *Id.* at 5.

Although Valenti testified on deposition that any store manager whose store had invisible waste above one and one-half percent in 1990 was appraised "Needs Improvement," (Valenti Dep. at 104) (HR-104, Ex. 28), the plaintiffs' accounting expert James Hart testified that in the plaintiffs' districts, nine store managers under the age of forty who had invisible waste above one and one-half percent for 1990 received evaluations higher than "Needs Improvement" in 1991. (Hart Aff. at 2) (HR-104, Ex. 40).

Not one of these younger store managers was demoted in 1991. (Hart Aff. at 3).[17]

We are persuaded that the plaintiffs, through their substantial allegations and evidence, have met the "similarly situated" requirement of § 216(b). Accordingly, we hold that Judge Shoob did not abuse his discretion in allowing the creation of an opt-in class.

C. *Evidentiary Hearing*

K Mart also faults Judge Shoob for not conducting an evidentiary hearing prior to making his § 216(b) ruling. We review Judge Shoob's ruling for abuse of discretion. *See United States v. Dynalectric Co.*, 859 F.2d 1559, 1580, *cert. denied*, 490 U.S. 1006, 109 S.Ct. 1641, 104 L.Ed.2d 157 (1989).

A court *may* hold an evidentiary hearing prior to certifying a class, *see e.g., Nelson v. United States Steel Corp.*, 709 F.2d 675, 676 (11th Cir.1983) (Rule 23 certification); *Jones v. Diamond*, 519 F.2d 1090, 1098 (5th Cir.1975) (same). The failure to hold an evidentiary hearing, however, does not require reversal of the class certification unless the parties can show that the hearing, if held, would have affected their rights substantially. *See Burns v. Long*, 44 F.3d 1031 (Table), 1994 WL 709329, *3

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[17] Although K Mart has made its own substantial allegations (supported by affidavits and depositions) which contradict many of the facts that the plaintiffs seek to prove, we are satisfied that the plaintiffs' substantial allegations "successfully engage [K Mart]'s affidavits to the contrary" and thus suffice to support Judge Shoob's § 216(b) ruling. *See Sperling v. Hoffmann-LaRoche*, 118 F.R.D. at 406-07.

(D.C.Cir.1994); *Dellums v. Powell,* 566 F.2d 167, 189 n. 56 (D.C.Cir.1977) ("[I]n the absence of a showing that [class] certification affected the 'substantial rights of the parties,' Rule 61, Fed.R.Civ.P., it is doubtful that reversal of certification on appeal would ever be appropriate"), *cert. denied,* 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978).

Because the plaintiffs' substantial allegations and evidence, portions of which we have detailed above, adequately support Judge Shoob's § 216(b) ruling, and because K Mart has not shown that an evidentiary hearing would have affected its substantial rights, we hold that Judge Shoob did not abuse his discretion in allowing the creation of an opt-in joinder class under § 216(b) without first conducting an evidentiary hearing.[18]

IV. The Temporal Scope of the Opt-In Class

A. *In General*

A person who believes that he has been the victim of age discrimination must file a charge with the EEOC within 180 days of the adverse employment decision (here demotion)[19] if he is in a "non-deferral state," 29

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[18] Finally, K Mart argues that Judge Shoob's § 216(b) ruling in *Helton* violated "law of the case" given that Judge Carnes had previously severed the *Grayson* case. This argument is meritless. Even if we were to apply the doctrine of "law of the case" as between coordinate judges, it would be Judge Shoob's *denial* of severance in *Helton* on September 30, 1993, not Judge Carnes' subsequent grant of severance in *Grayson* on February 22, 1994 that would arguably constitute the "law of the case."

[19] More accurately, the time for filing an EEOC charge begins to run when the employee receives unequivocal notice of

U.S.C. § 626(d)(1);[20] and within 300 days of the employer's wrongful conduct if he is in a "deferral state," 29 U.S.C. § 626(d)(2).[21]

If the demotion occurred prior to November 21, 1991, the effective date of the Civil Rights Act of 1991, the plaintiff then has two years from the date of his demotion to begin a civil action for a non-willful violation of the ADEA; or three years to begin a civil action for a willful violation of the ADEA. 29 U.S.C. § 626(e).[22] If the

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the adverse employment decision. *See Cocke v. Merrill Lynch & Co.*, 817 F.2d 1559, 1561 (11th Cir.1987) (ADEA wrongful termination case in which the Court noted that the 180-day period is counted from the date the employee receives notice of termination); *see also Delaware State College v. Ricks*, 449 U.S. 250, 259, 101 S.Ct. 498, 504, 66 L.Ed.2d 431 (1980) (Title VII case); *Chardon v. Fernandez*, 454 U.S. 6, 8, 102 S.Ct. 28, 29, 70 L.Ed.2d 6 (1981) (section 1983 case).

[20] "Non-deferral states" are those states without a state law banning age discrimination in employment and without a state entity authorized to grant or to seek relief for victims of such discrimination.

[21] Deferral states are those states having a state law banning age discrimination in employment and a state entity authorized to grant or to seek relief for victims of such discrimination.

"In a deferral state, the claimant must also have commenced proceedings under state law before filing a civil action under the ADEA. The ADEA suit may then be brought at least sixty days after the commencement of state proceedings, or earlier if the state proceedings are terminated before the sixty-day period has expired." *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189, 194 (6th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 379, 133 L.Ed.2d 302 (1995); 29 U.S.C. § 633(b).

[22] In summary, if an employee was demoted on Day One, he has 300 days, i.e., until Day 301, to file a charge with the

demotion occurred on or after November 21, 1991, then the two-year and three-year statutes of limitations no longer apply, and the plaintiff instead must begin a civil action within ninety days after the date of his receipt of the EEOC's notice that his charge was filed. 29 U.S.C. § 626(e).

In any event, whether the conduct occurred before or after November 21, 1991, the plaintiff must wait sixty days after his EEOC charge is filed before commencing a civil action. 29 U.S.C. § 626(d).[23] After the sixty-day waiting period has elapsed, the plaintiff may then file suit in court. Unlike Title VII, the ADEA does not require that the plaintiff first receive a right to sue notice from the EEOC prior to commencing suit.[24]

EEOC. That 300 days is included within the time period in which the employee is obliged to commence a suit in court: that is, two years from date of demotion for nonwillful violations and three years from date of demotion for willful violations.

[23] Congress enacted this sixty-day waiting period to afford the EEOC or state agency the opportunity to informally conciliate disputes and thereby divert them from the courts. Howard Eglit, 1 *Age Discrimination* § 6.37 at 6-229 (2d ed. 1994) (citing Conference Comm., Age Discrimination in Employment Act Amendments of 1978, H.R.Rep. No. 950, 95th Cong., 2d Sess. 12 (1978)).

[24] *See* Howard Eglit, 1 *Age Discrimination* § 6.37 at 6-230 (2d ed. 1994) (citing Committee on Education and Labor, U.S. House of Representatives, Civil Rights and Women's Equity in Employment Act of 1991, H.R.Rep. No. 40 at 1, 102d Cong, 1st Sess 96-97 (1991); Committee on the Judiciary, Civil Rights Act of 1991, H.R.Rep. No. 40 at 2, 102d Cong. 1st Sess, 41 (1991) U.S.Code Cong. & Admin.News 1991 pp. 549, 579, 634, 635).

B. *Judge Shoob's Order Allowing Opt-Ins Based on Grayson's Charge*[25]

Judge Shoob defined the opt-in class as including K Mart store managers who were demoted (or who resigned after being told that they would be demoted) in K Mart's Southern Region, and who were at the time of the demotion or resignation, at least forty years old. (Order filed July 21, 1994 at 2). In defining the temporal scope of the class, Judge Shoob originally granted the plaintiffs' motion to allow all persons who had been demoted or who had resigned from a store manager position anytime during the period from 1990 to 1992, to opt into the class. *Id.*

Later, Judge Shoob accepted the plaintiffs' concession that the proposed class should be limited to putative plaintiffs who had been demoted (or forced to resign) on or after August 18, 1990[26] if they worked in deferral states, or on or after December 16, 1990[27] if they worked in non-deferral states. (Order filed Oct. 6, 1994 in *Helton* at 2). In other words, Judge Shoob allowed putative

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[25] A "charge," as defined by the EEOC, and as used in this opinion, is "a statement filed with the [EEOC] by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act." 29 C.F.R. § 1626.3. Mr. Grayson filed his charge with the EEOC on June 14, 1991 ("Grayson's charge").

[26] Three hundred days before Grayson's charge was filed.

[27] One hundred eighty days before Grayson's charge was filed.

plaintiffs to piggyback onto Grayson's June 14, 1991 EEOC charge.[28]

Because Judge Shoob's definition of the class would include putative plaintiffs demoted prior to November 21, 1991, Judge Shoob's definition of the class would implicate opt-in plaintiffs who are subject to the pre-Civil Rights Act statutes of limitations.

C. *The Issues*

K Mart challenges Judge Shoob's calculation of the temporal scope of the opt-in class primarily on four grounds. K Mart alleges that:

(a) The piggybacking rule is inapplicable to ADEA cases;

(b) Judge Shoob erred in allowing opt-in plaintiffs to piggyback onto Grayson's EEOC charge, given that Grayson was not an original plaintiff in the *Helton* action but was himself only an opt-in plaintiff;

(c) Judge Shoob's definition of the class improperly allows putative plaintiffs whose own claims would otherwise be time-barred under either the 2-year or 3-year statute of limitations, to opt into the *Helton* action.

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[28] Judge Shoob does not explain why he thought Grayson's charge was the appropriate one for plaintiffs to piggyback onto, but we can assume that he did so because he favored the maximum number of plaintiffs and the earliest date for piggybacking.

(d) The representative EEOC charge upon which putative plaintiffs are permitted to piggyback does not provide adequate notice of class-wide discrimination.

Issue 1: The Applicability of the Piggybacking Rule in ADEA Cases

K Mart alleges that Judge Shoob erred in finding that the piggybacking rule applies to ADEA cases. This is a question of law over which we have *de novo* review. *See Estate of Kosow v. Commissioner,* 45 F.3d 1524, 1528 (11th Cir.1995). We hold that Judge Shoob did not err.

In general, the single-filing (or "piggybacking") rule[29] provides that under some circumstances, a grievant who did not file an EEOC charge may opt into a class action by "piggybacking" onto a timely charge filed by one of the named plaintiffs in the class action. This Court has not directly addressed the issue of whether the piggybacking rule applies to ADEA cases. We have recently recognized, however, in *Calloway v. Partners National Health Plans,* 986 F.2d 446 (11th Cir.1993), that the piggybacking rule is applicable to Title VII cases. We held that an employment discrimination plaintiff may piggyback provided that "(1) the relied upon charge [to which he is piggybacking] is not invalid, and (2) the individual claims of the filing and non-filing plaintiff [the named filing plaintiff and the piggybacking plaintiff] arise out of similar discriminatory treatment in the same

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[29] The "piggybacking rule" is synonymous with the "single filing rule," and we will use these terms interchangeably throughout this opinion.

time frame." *Id.* at 450. In *Shuster v. Federated Department Stores, Inc.*, 508 F.Supp. 118 (N.D.Ga.1980), Judge Vining in the Northern District of Georgia, found the piggybacking rule to be applicable to ADEA cases. *Id.* at 121.

There is no reason why piggybacking should be allowed in Title VII cases but not in ADEA cases, given that the ADEA in many ways tracks Title VII, and in light of Congress's policy that ADEA plaintiffs should have the opportunity to proceed collectively. *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170, 110 S.Ct. 482, 486, 107 L.Ed.2d 480 (1989).

K Mart cites *Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir.1977) for the proposition that this Court has rejected the piggybacking rule in ADEA cases. We do not agree. In Price, the Court, was not faced with the issue of whether piggybacking is permissible in an ADEA action. Instead, Price simply held that an ADEA class action must be maintained as an opt-in class under § 216(b), rather than as an opt-out class under Rule 23. In so holding, Price stated that "only those members who had filed a notice of intent to sue [an EEOC charge]" and "who had filed a written consent to becoming plaintiffs in the action would be included in the class." *Id.* at 610-11.

This language, which K Mart reads to mandate that each plaintiff file his own EEOC charge, was only intended to draw a distinction between § 216(b) opt-in class actions and Rule 23 opt-out class actions, and cannot be interpreted to mean a rejection of piggybacking, which was not even an issue in Price. Furthermore, even though this circuit has not yet done so, the Fifth Circuit at least has since adopted the piggybacking rule in ADEA cases.

See Anson v. University of Texas Health Science Ctr., 962 F.2d 539, 541 (5th Cir.1992).

We hold that piggybacking is available in ADEA cases and that an age discrimination plaintiff may piggyback provided that the Calloway requirements, cited *supra*, are satisfied.

In so doing, we would join the majority of circuits. *See Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1223 (5th Cir.1995) (ADEA case in which court stated that the federal courts universally recognize piggybacking rule); *Howlett v. Holiday Inns, Inc.*, 49 F.3d at 194 ("[T]he federal courts to address the issue have uniformly held that the [single filing] rule is applicable in the ADEA context. . . . We join those courts in holding that the single filing rule applies to ADEA cases.") (citing *Anson v. University of Texas Health Science Ctr.*, 962 F.2d 539, 541 (5th Cir.1992)); *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1058 (2d Cir.1990), *cert. denied*, 499 U.S. 983, 111 S.Ct. 1641, 113 L.Ed.2d 736 (1991).

Issue 2: The Representative Class Action Charge

K Mart argues that even if the piggybacking rule is applicable to ADEA cases, Judge Shoob erred in allowing putative plaintiffs to piggyback onto Grayson's EEOC charge, given that Grayson was not an original plaintiff in the *Helton* action but was himself only an opt-in plaintiff. As such, Grayson necessarily depended upon the amended *Helton* complaint in 1994 to relate back to the original *Helton* complaint in 1992.

On the other hand, K Mart alleges that Kempton's April 15, 1992 EEOC charge was the first timely filed charge of a *named plaintiff* and thus should be the representative charge from which the rearward scope of any class should be defined.[30] We agree.

The purpose of the requirement that a plaintiff file an EEOC charge within 180 days (or 300 days in a deferral state) of the allegedly illegal act or practice is (1) to give the employer prompt notice of the complaint against it, and (2) to give the EEOC sufficient time to attempt the conciliation process before a civil action is filed. *Larkin v. Pullman-Standard Div., Pullman, Inc.*, 854 F.2d 1549, 1562-65 (11th Cir.1988), *vacated on other grounds sub nom, Swint v. Pullman-Standard*, 493 U.S. 929, 110 S.Ct. 316, 107 L.Ed.2d 307 (1989). The principle behind the piggybacking rule is to give effect to the remedial purposes of the ADEA and to not exclude otherwise suitable plaintiffs from an ADEA class action simply because they have not performed the "useless act of filing a charge." *See Larson,*

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[30] Some confusion has arisen as to when an opt-in charge can be deemed to have operative effect. Because the FLSA speaks in terms of the date that the charge is filed with the EEOC, we consider that to be the effective date. Some of the plaintiffs who are in deferral states, however, have filed their charges with the state agencies. It is significant to us, however, that the briefs of the parties have relied on the dates on which the charges were *signed* rather than *filed* with either the state agency or the EEOC. We see no reason not to give the "signature dates" effect as concessions made by the parties even though, analytically, we believe the correct jurisprudence for the future should be either proof of filing with the state agency in a deferral state or proof of filing with the EEOC in a non-deferral state.

Employment Discrimination § 102.35(b) at 21-276.29 – 21-276.30. *See Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1223 (5th Cir.1995) (" 'It would be wasteful, if not vain for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC.' ") (quoting *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir.1968)).

In general, in applying the single-filing or piggybacking rule, the courts have defined the temporal scope of the class based on the timely filed charge of one of the named plaintiffs. In *Calloway*, this circuit's evolving application of the single-filing rule in the context of Title VII actions was summarized as follows:

> We first invoked the "single-filing rule" in the context of a class action to permit unnamed plaintiffs to rely on the EEOC charge filed by the named plaintiff. We then extended the single-filing rule to permit intervenors who had not filed EEOC charges to rely on the charge of one of the original plaintiffs. Finally, we permitted plaintiffs in multiple-plaintiff, non-class action lawsuits to rely on the charge filed by one of their co-plaintiffs.

Id. at 450 (citations omitted).

This Court has recognized, however, that the charge of someone other than a named plaintiff of the class action can in some circumstances serve as the underlying "piggybacked" charge on which a putative plaintiff can piggyback. For example, in *Larkin v. Pullman-Standard Division, Pullman, Inc.*, 854 F.2d 1549, 1562-65 (11th Cir.1988), *vacated on other grounds sub nom, Pullman-Standard, Inc. v. Swint*, 493 U.S. 929, 110 S.Ct. 316, 107 L.Ed.2d

307 (1989), the district court had allowed plaintiffs to opt into the Title VII class action based on the 1966 EEOC charge filed by Seals, a plaintiff in a later related class.[31] This Court found that the defendant, Pullman, had waived its right to object because it had known six years earlier of the district court's reliance on 1966 as the measuring date, *id.* at 1557, but did not object until 1983. *Id.* at 1565.[32] The court further found that "in any event," a charge filed by a party other than a named plaintiff could be used to establish the temporal scope of the class, where the charge sufficiently informed both the employer and the EEOC of the imminent class complaint. *Id.* The court noted that it was appropriate to date liability back to 1966 in *Larkin* since:

> Spurgeon Seals filed an EEOC charge in November 1966 complaining that the seniority system was being misapplied on account of his race, and less than six months later, an EEOC Commissioner filed a charge launching a broad-based challenge to Pullman's hiring and promotional practices. By the time Louis Swint [the named plaintiff] filed his 1969 charge, Pullman was well aware that its hiring and promotional practices were under scrutiny, and the EEOC

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[31] The earliest charge by a named plaintiff in the class action was filed in 1969.

[32] The timely filing of an EEOC charge is not a jurisdictional prerequisite to bringing a Title VII suit in federal court and thus is subject to waiver and estoppel. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1981).

> had been given ample time to attempt conciliation. To ignore this and restrict Pullman's liability to 180 days prior to Swint's charge would be nothing more than a technical reading of Title VII which is "particularly inappropriate in a statutory scheme in which layment [sic], unassisted by trained lawyers, initiate the process."

Larkin, 854 F.2d at 1563 (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527, 92 S.Ct. 616, 619, 30 L.Ed.2d 679 (1972)).

Larkin is distinguishable from this case because the defendant in *Larkin* had not objected to dating its liability from the 1966 charge. The court's holding in *Larkin*, therefore, is a holding on waiver and not on the substantive issue of dating. Here, we have no such waiver. K Mart had not waived its objection to the district court's reliance on Grayson's charge.

The plaintiffs also cite *Calloway v. Partners National Health Plans*, 986 F.2d 446 (11th Cir.1993), a Title VII case alleging wage discrimination, in support of its piggybacking argument. In *Calloway*, Steward, a black female, had been fired from Partners National Health Plans ("Partners") in February 1988, after which she filed an EEOC charge on February 19, 1988 alleging discrimination with respect to wages and other employment conditions. Calloway, the only other black female at Partners, resigned in 1989, after attempting unsuccessfully to negotiate a higher salary. Steward filed suit in 1989 after receiving her right to sue notice from the EEOC. Calloway unsuccessfully attempted to intervene in Steward's lawsuit, and the district court treated Calloway's claim as a separate lawsuit. After the bench trial on Calloway's case,

however, the district court found Calloway's claim to be sufficiently similar to Steward's claim such that Calloway could rely on Steward's EEOC charge. This Court agreed, holding that Calloway, as an unsuccessful intervenor, could piggyback and rely on Steward's charge provided that the charge was valid and the individual claims of Calloway and Steward arose out of similar discriminatory treatment in the same time frame.

Calloway, too, is distinguishable from the present case, in that *Calloway* is a Title VII case; it is a wage-discrimination rather than an age demotion case under the ADEA; and the court in Calloway did not define the scope of a class action, but instead made a fact-specific determination that Calloway, an unsuccessful intervenor, could rely on Steward's charge where it was undisputed that both of their claims arose out of similar discriminatory treatment in the same time frame.

In this case, *Grayson's* charge is particularly inadequate as a representative charge. First, as discussed *infra,* Grayson's own action is time-barred because he failed to file his written consent to opt into the *Helton* class within three years of his demotion. (HR22-147). Grayson was demoted on April 9, 1991, (EEOC Charge of Mercer David Grayson, Appendix to Memorandum of Law in Support of Plaintiffs' Motion to Permit Joinder of Similarly Situated Plaintiffs) (HR-85), and Grayson filed his consent to opt into the *Helton* class more than three years later, on September 19, 1994. (Notice of Filing Consent to Opt In as a Party Plaintiff) (HR-147). Thus, Grayson should be barred from joining the *Helton* class and his charge should not and cannot serve as the representative charge for others in such a case.

Second, even if Grayson's action were not time-barred, his EEOC charge provides insufficient notice of the scope of the class. Grayson's charge stated: "For the past five years, the Company has systematically [retired or] demoted managers in the protected age group and replaced them with younger managers." (Grayson Charge of June 14, 1991). Although this charge puts the EEOC on notice of demotions occurring prior to Grayson's charge, it does *not* put the EEOC on notice of demotions occurring *after* the filing of Grayson's charge on June 14, 1991. Thus, based on Grayson's charge itself, putative plaintiffs who were demoted after June 14, 1991 could not opt into the *Helton* class, even though the *Helton* complaint alleges that K Mart's discriminatory policy led to wrongful demotions through 1991 and into 1992.[33]

Accordingly, in selecting the representative charge for *Helton*, Judge Shoob should not have selected Grayson's charge, but rather should have chosen the first timely filed charge of one of the named plaintiffs that gives adequate notice of the scope of the class. Kempton's charge of April 15, 1992 is the first timely filed charge of a named plaintiff which gives notice of classwide discrimination.[34] Kempton's charge, read together with the charges of the other named *Helton* plaintiffs, provides

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[33] For example, among the named plaintiffs: Helton was demoted on March 13, 1992; Kempton was demoted on March 2, 1992; and Payne was demoted on January 27, 1992; Taylor was demoted on March 18, 1991, and Williams was demoted on February 10, 1991.

[34] Kempton was demoted on March 2, 1992.

adequate notice to the EEOC of the scope of the class alleging discrimination.

Issue 3: The Statutes of Limitations

Additionally, K Mart argues that Judge Shoob's order improperly allowed the joinder of putative plaintiffs whose own claims would have been untimely under the pre-Civil Rights Act statutes of limitations.[35] The plaintiffs do not dispute the legal rule that putative plaintiffs must satisfy the statute of limitations in order to opt into the class, but they contend that Judge Shoob's formulation of the class did not implicate time-barred claims. We hold otherwise.

The plaintiffs concede that as of October 29, 1992, when the original *Helton* complaint was filed, the complaint did not allege a class action. The plaintiffs further acknowledge that they did not allege a class action until the *Helton* complaint was amended on October 18, 1994, when for the first time a class action was pleaded. The plaintiffs argue, however, that the October 18, 1994 class action amendment should be deemed to "relate back" to the original *Helton* complaint, filed October 29, 1992, such that the original complaint commenced the opt-in plaintiffs' civil class actions.

Thus, under the plaintiffs' theory, a putative plaintiff could have been demoted as early as October 29, 1989

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[35] K Mart does not argue that Judge Shoob's definition of the *Helton* class improperly allowed the opting-in of putative plaintiffs whose claims are time-barred under the post-Civil Rights Act ninety-day statute of limitations.

and still have been within the three-year statute of limitations for willful violations of the ADEA; or demoted as early as October 29, 1990 and still have been within the two-year statute of limitations for non-willful violations of the ADEA. The plaintiffs accordingly argue that Judge Shoob's order, by allowing persons demoted as early as August 18, 1990 in deferral states and as early as December 16, 1990 in non-deferral states, would be timely under either of the statutes of limitations.[36]

Although we agree that the October 18, 1994 class action amendment which Judge Shoob granted should relate back to the October 29, 1992 complaint,[37] we disagree with the plaintiffs' contention that the statutes of limitations are tolled for opt-in plaintiffs when the class complaint is filed. The issue of when an opt-in plaintiff is deemed to commence his civil class action (and thus toll the statute of limitations on his claim) is a question of law

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[36] Even if we agreed entirely with the plaintiff's theory, we note that Judge Shoob's order, even on its own terms, implicates time-barred claims. As we have earlier stated, Judge Shoob's order allowed plaintiffs who had been demoted in deferral states between August 18, 1990 and October 28, 1990 to opt into the class, even though such plaintiffs, if they claimed nonwillful violations, would be time-barred by the two-year statute of limitations, as measured by the *Helton* complaint, filed October 29, 1992. Judge Shoob, in entering his order, apparently followed Title VII rather than what we believe to be the correct analogy, the FLSA.

[37] K Mart had argued (and argues here) that the class action amendment was untimely and should be denied. Judge Shoob rejected this argument, noting that it was within his discretion to grant leave to amend, and finding no reasons why the amendment should be disallowed.

over which we exercise *de novo* review. *See Estate of Kosow v. Commissioner,* 45 F.3d 1524, 1528 (11th Cir.1995). We are persuaded by K Mart's argument that opt-in plaintiffs commence an ADEA civil action, not when the complaint is filed, but when the putative plaintiff files a written consent to opt into the class action.

It is undisputed that named plaintiffs commence their civil action upon the filing of their complaint. *See O'Connell v. Champion Int'l Corp.,* 812 F.2d 393, 394 (8th Cir.1987). However, we have not as yet addressed, and the circuits are split on, the issue of when a civil action is deemed to be commenced by an *opt-in plaintiff* in an ADEA class action. At the root of this controversy is whether ADEA opt-in actions should be governed by the tolling principle of the Fair Labor Standards Act or that of Title VII. The Eighth Circuit has held that because the ADEA provides for opt-in joinder by incorporating § 216(b) of the FLSA, that ADEA opt-in plaintiffs should, under 29 U.S.C. § 256(a) of the FLSA,[38] be deemed to commence their civil action only when they file their written consent to opt into the class action. *See O'Connell v. Champion Int'l Corp.,* 812 F.2d 393 at 394.

On the other hand, the Third Circuit has reasoned that because the ADEA did not specifically incorporate 29 U.S.C. § 256(a) of the FLSA, that Congress did not intend for ADEA actions to be subject to that tolling rule. *See*

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[38] Section 256(a) provides that if a plaintiff joins a pending class action, his action commences when he opts into the action by filing written consent with the court in which the action is pending. 29 U.S.C. § 256(a). This section codifies section seven of the Portal-to-Portal Act.

Sperling v. Hoffmann-LaRoche, Inc., 24 F.3d 463, 467 (3d Cir.1994). That court has instead noted that because the ADEA shares many similarities with Title VII, *id.* at 467 (citing to the district court opinion, *Sperling*, 145 F.R.D. at 358), the statute of limitations for ADEA opt-in plaintiffs should be tolled by the filing of the original class complaint. *Id.* at 472-73.

We are persuaded that the Eighth Circuit's opinion in O'Connell states the better view: that is, that ADEA opt-in plaintiffs are deemed to commence their civil action only when they file their written consent to opt into the class action. In creating a collective action procedure for ADEA actions, Congress clearly adopted the opt-in joinder procedures of section 216(b) of the FLSA and thus impliedly rejected the Rule 23 class action procedures applicable to Title VII actions. *LaChapelle v. Owens Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir.1975). In *LaChapelle*, the court recognized that:

> There is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 16(b). In a Rule 23 proceeding a class is described; if the action is maintainable as a class action, each person within the description is considered to be a class member and, as such, is bound by judgment, whether favorable or unfavorable, unless he has "opted out" of the suit. Under § 16(b) of FLSA, on the other hand, no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has

> affirmatively "opted into" the class; that is, given his written, filed consent.

Id. at 288.

In addition, "the requirements for satisfying Rule 23 are considerably more involved than is the unitary 'similarly situated' requirement of § 16(b) [Sec. 216(b)]." Howard Eglit, 1 *Age Discrimination* § 6.50 at 6-304 (2d ed. 1994). Thus, in *LaChapelle,* the Fifth Circuit held that Rule 23 and § 216(b) actions are "mutually exclusive and irreconcilable," *id.* at 289, and "it is crystal clear that § 16(b) [Sec. 216(b)] precludes pure Rule 23 class actions in FLSA suits." *Id.* at 288. We find that by rejecting the Rule 23 class action procedure for ADEA claims, Congress also rejected the concomitant complaint-tolling rule of Rule 23.

The legislative history of both § 216(b) and the ADEA show that Congress meant for ADEA actions to be governed by the tolling principle of § 256 of the FLSA.

First, with the Portal-to-Portal Act, Congress amended § 216(b) of the FLSA to provide that an employee must file written consents in order to be made a party plaintiff to the collective action under § 216(b). In discussing this amendment, Congress expressed the concern that an opt-in plaintiff should not be able to escape the statute of limitations bearing on his cause of action by claiming that the limitations period was tolled by the filing of the original complaint. 93 Cong.Rec. 2,182 (1947). Thus, by incorporating § 216(b) into the ADEA, Congress also incorporated the principle that only a written consent to opt-in will toll the statute of limitations on an opt-in plaintiff's cause of action.

Second, the legislative history of the ADEA shows that Congress intended to follow the enforcement procedures of the FLSA:

> The enforcement techniques provided by § 830 [the ADEA] are directly analogous to those available under the Fair Labor Standards Act; in fact, S. 830 incorporates by reference, to the greatest extent possible, the provisions of the Fair Labor Standards Act.

113 Cong.Rec. 31,254 (1967). *See* Douglas L. Williams and Julia A. Davis, Age Discrimination Opt-In Class Actions: The Good, The Bad, and The Unresolved, C463 ALI-ABA *157, 191-92 (Nov. 30, 1989). Thus, ADEA class actions, which, as a general matter, track the enforcement procedures of the FLSA, are subject to the tolling principle of § 256 of the FLSA even though § 256 was not specifically incorporated into the ADEA.

Accordingly, we conclude that a putative plaintiff must file his written consent to opt into the class action prior to the expiration of the statute of limitations on his ADEA claim.[39] A contrary ruling would mean that the

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[39] This would of course, apply only to plaintiffs who were subject to the allegedly discriminatory act prior to November 21, 1991, the effective date of the Civil Rights Act of 1991. The Civil Rights Act replaced the two-year and three-year statutes of limitations with a ninety-day period in which to begin a civil action after the plaintiff has received the EEOC's notice that his charge was filed.

For plaintiffs who allege being subject to wrongful conduct occurring after November 21, 1991, an analogous rule would be to allow potential plaintiffs ninety days from the date they receive the notice of the opt-in class, to file their written consent

piggybacking rule could be applied to virtually eliminate the statute of limitations for opt-in plaintiffs in ADEA actions.

We therefore direct Judge Shoob to define the *Helton* class to bar putative plaintiffs who have failed to file written consents to opt into the class within two years of their demotions for nonwillful violations or within three years of their demotions for willful violations.

Issue 4: Notice of Class-Wide Discrimination

K Mart further argues that the underlying EEOC charge failed to give adequate notice of "class-wide" discrimination for purposes of applying the piggyback concept.

To serve as the basis of an ADEA class action, the underlying EEOC charge must contain allegation(s) of class-wide discrimination. *See Anson v. Univ. of Texas Health Science Ctr.*, 962 F.2d 539, 541 (5th Cir.1992) ("[M]any courts require that the administrative charge give notice to the administrative agency and the defendant that the discrimination is class-wide."); *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir.1986) (because

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to opt into the class. *But see Anderson v. Unisys Corp.*, 47 F.3d 302, 308-09 (8th Cir.1995) (holding that nonfiling piggybacking plaintiffs who were demoted post-Civil Rights Act may opt into a class so long as the claimant upon whose EEOC charge they are piggybacking files suit within ninety days of receiving a right-to-sue letter from the EEOC), *cert. denied*, ___ U.S. ___, 116 S.Ct. 299, 133 L.Ed.2d 205 (1995). *Compare O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 394 (8th Cir.1987).

the purpose of the charge is to afford the EEOC an opportunity to resolve the dispute short of litigation and because the charge serves to apprise the employer of its alleged wrongdoing, "[a]n allegation of classwide discrimination or claim of class representation" is necessary); *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1016 (7th Cir.1988) ("[T]he charge must, at the very least, contain an allegation of class-wide discrimination."). To make an allegation of classwide discrimination, "there must be some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim," and the charge must alert the EEOC that "more is alleged than an isolated act of discrimination." *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1058 (2d Cir.1990), *cert. denied*, 499 U.S. 983, 111 S.Ct. 1641, 113 L.Ed.2d 736 (1991).

We are persuaded that Kempton's charge, when read with the charges of the other named plaintiffs of the *Helton* class, adequately puts the EEOC on notice of the class action being asserted. In the present case, Kempton's April 15, 1992 charge stated that he was demoted on March 2, 1992, and that: "Within the last year, at least fifteen (15) other store managers, all over age 40, have been demoted." (EEOC Charge of Charles Kempton, Appendix to Memorandum of Law in Support of Plaintiffs' Motion to Permit Joinder of Similarly Situated Plaintiffs) (HR-85). Another named plaintiff, James Taylor, filed a charge on June 18, 1992, stating that: "Other older store managers have been demoted." (HR-85). Yet another named plaintiff, Robert Williams,

filed a charge stating that: "At least six other store managers, over age 40 years, were also demoted and cut in pay." (HR-85).[40]

Accordingly, we hold that Kempton's, Taylor's, and possibly Williams' charges give notice to the EEOC of classwide discrimination occurring up to at least March 2, 1992. In contrast, Grayson's charge only gives notice of discrimination occurring up to June 14, 1991.[41]

V. Conclusion

We hold in the opinion proper that (i) Judge Shoob properly applied piggybacking to this ADEA case; (ii) putative plaintiffs should be allowed to piggyback only on the timely filed EEOC charge of an original *named plaintiff* of class action; and (iii) the ADEA statutes of limitations, pertaining to the claims by those opt-in plaintiffs who were demoted prior to November 21, 1991 (the effective date of the 1991 Civil Rights Act), are tolled by the filing of the opt-in plaintiffs' written consents to opt in, not by the filing of the original *Helton* complaint. We also hold, in agreement with Judge Shoob, that on the

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[40] There appears to be a factual dispute as to when Williams was demoted or unequivocally notified of his demotion. This fact would have to be determined by the district court.

[41] Finally, the plaintiffs argue on cross-appeal that if this Court reversed Judge Shoob's § 216(b) ruling or otherwise barred the *Grayson* plaintiffs from opting into the *Helton* action, that the Court should reverse Judge Carnes' severance order and reconsolidate the *Grayson* case. Because we affirm Judge Shoob's § 216(b) ruling, we need not reach this issue.

record before us, the representative charges gave adequate notice of classwide discrimination.

Thus we will AFFIRM Judge Shoob's July 21, 1994 Order allowing the creation of an opt-in joinder class pursuant to 29 U.S.C. § 216(b). However, we will REVERSE and REMAND the proceeding so that Judge Shoob may modify the temporal scope of the *Helton* class consistent with the foregoing opinion.

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Carl Helton et al., Plaintiffs,

v.

K Mart Corp., Defendant.

Civil Action No. 1:92-cv-2564-MHS.

Filed July 21, 1994.

ORDER

This action is before the Court on various motions. The Court's rulings are summarized below.

I. *MOTION TO MODIFY CONFIDENTIALITY ORDER*

Plaintiffs have moved that the Court modify the Consent Protective Order entered November 30, 1993, to permit information and documents designated as "confidential" under that order to be used by plaintiffs' lawyers and their clients in *Grayson et al. v. K Mart*

Corporation, 1:92-cv-141-JEC, and in *Sands et al. v. K Mart Corporation*, 1:93-cv-20330-JEC, consistent with the confidentiality orders in place in those cases. Because discovery has closed in the *Grayson* and *Sands* cases and granting plaintiffs' motion would have the effect of extending discovery in those cases, the Court denies the motion. Any further extension or supplementation of discovery in *Grayson* or *Sands* should be determined by Judge Carnes and not by modification of the protective order in this action.[1]

II. *MOTIONS TO PERMIT JOINDER, FOR LEAVE TO AMEND, AND TO AUTHORIZE NOTICE*

Plaintiffs have filed a motion to permit joinder of similarly situated additional plaintiffs under 29 U.S.C. 216(b), for leave to amend the complaint, and to authorize notice to potential additional plaintiffs. For the reasons stated below, the Court grants these motions.

Plaintiffs in this action are five former store managers of Kmart retail stores who claim that they were discriminated against on the basis of age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"). They allege that between 1990 and 1992, following a company-wide reorganization, plaintiffs "were victims of an age-motivated purge" of store managers in

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[1] The Court abhors the possibility of multiple discovery motions to obtain permission from this Court to use materials in this action that were produced and labeled as confidential by defendant in *Grayson* and *Sands*. The Court strongly encourages the parties to work out such discovery disputes without the Court's involvement. *See* Fed.R.Civ.P. 37.

Kmart's southern region. They seek to allow persons to join in this action who were demoted or resigned from the position of store manager during the 1990-1992 period and were at least 40 years old. They request leave to amend their complaint to add that the action is brought on behalf of other similarly situated persons and ask the Court to approve issuance of a notice to the potential additional plaintiffs informing them of their right to join in the action.

A. *Joinder*

The ADEA incorporates the procedures of the Fair Labor Standards Act ("FLSA") for combining claims of similarly situated plaintiffs. The procedure under the FLSA provides for an "opt-in class action." 29 U.S.C. § 216(b).

Defendant argues that an opt-in class action is not appropriate here because plaintiffs have not made substantial allegations that the additional plaintiffs are similarly-situated. Defendant claims that the record does not support plaintiffs' claim that the additional class members are similarly situated. Defendant points to the February 22, 1994 Order by Judge Carnes in a similar case, ruling that the plaintiffs' claims in that case should be severed because plaintiffs had not directed the court's attention to any "discrete program or procedure employed by Kmart that affected each of the plaintiffs." This Court, however, does not interpret the "similarly situated" language of 29 U.S.C. § 216(b) as requiring plaintiffs to demonstrate a "discrete program or procedure" affecting each of the potential plaintiffs.

"Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively. A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the poolings of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffman [Hoffmann]-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 [110 S.Ct. 482, 486, 107 L.Ed.2d 480] (1989). In this action, plaintiffs are alleging an upper management policy of age discrimination that affected plaintiffs and the "opt-in class" of plaintiffs. These allegations describe the circumstances giving rise to the alleged upper management policy and the manner in which that policy allegedly resulted in age discrimination against a class of plaintiffs. Furthermore, these allegations are supported by deposition and affidavit evidence. The Court concludes that plaintiffs have made substantial allegations of common issues of law and fact arising from the same alleged discriminatory activity that is sufficient to warrant granting plaintiffs the opportunity to proceed collectively.

Defendant further argues that the charges filed by plaintiffs did not provide the Equal Employment Opportunity Commission ("EEOC") with notice that plaintiffs were seeking to represent a class. Defendant claims that individuals may opt-in under the provisions of 29 U.S.C. § 216(b) only if one or more of the plaintiffs filed EEOC charges giving the EEOC notice of the class nature of the claims so that the EEOC could attempt to fulfill the conciliatory purpose of the notice requirements of 29 U.S.C. § 626(d). *See Kloos v. Carter-Day Co.*, 799 F.2d 397,

402 (8th Cir.1986); *Church v. Consolidated Freightways, Inc.*, 137 F.R.D. 294, 300-01 (N.D.Cal.1991). Defendant claims that plaintiffs' EEOC charges did not allege either class-wide discrimination or that they were filed on behalf of a class.

All of the circuits that have addressed this issue have held that the timely filing of an administrative claim by a named plaintiff in a § 216(b) class action satisfies the filing obligation of all members of the class as long as the administrative claim gave notice to the administrative agency of alleged class discrimination.[2] *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1058 (2nd Cir.1990) (even where an ADEA class action has been decertified, individuals may piggyback onto an administrative claim filed by another individual as long as the claim indicated that the grievance affects a group of individuals, alerting the administrative agency that more is alleged than an isolated act of discrimination and giving sufficient notice to the employer for it to explore conciliation with the affected group); *Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1008, 1016 (7th Cir.1988) (similarly situated individuals can opt-in to a suit if the plaintiff's administrative claim

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[2] The Eleventh Circuit has never decided whether individuals that have not filed an administrative claim can opt-in to a suit filed by a similarly situated plaintiff who timely filed an administrative claim. *See McCorstin v. United States Steel Co.*, 621 F.2d 749, 755 (5th Cir.1980). In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir.1981), the Eleventh Circuit adopted as binding precedent all cases decided by the Fifth Circuit before September 30, 1981.

gave notice to the administrative agency and the defendant that the discrimination is class-wide); *Lusardi v. Lechner*, 855 F.2d 1062, 1078-79 (3rd Cir.1988) (so long as class issues are alleged, a timely charge may serve as the basis for a class action); *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir.1986) (to serve as a basis for a class action, claim must allege class-wide discrimination or that it represents class); *Naton v. Bank of California*, 649 F.2d 691, 697 (9th Cir.1981) (claimant must purport in the administrative claim to represent a class or others similarly situated); *Mistretta v. Sandia Corp.*, 639 F.2d 588, 593-94 (10th Cir.1980).

In this action, plaintiff Kempton's administrative claim states that "[w]ithin the last year, at least fifteen (15) other store managers, all over age 40, have been demoted." Plaintiff Taylor's administrative claim states that "[o]ther older store managers have been demoted." Plaintiff Bob Williams' administrative claim states that "[a]t least six other store managers, over age 40 years, were also demoted and cut in pay." The Court concludes that these timely filed administrative claims filed by three of the five named plaintiffs in this action gave notice of class discrimination to the EEOC and to Kmart, alerting the agency and employer that more is alleged than an isolated act of discrimination and that these claims therefore satisfy the filing obligation of all members of the class. Accordingly, the Court grants plaintiffs' motion to permit joinder of similarly situated additional plaintiffs under 29 U.S.C. § 216(b).

B. *Leave to Amend*

Defendant argues that the Court should deny plaintiffs' motions as untimely. "[A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a); *Nolin v. Douglas County,* 903 F.2d 1545 [1546], 1550 (11th Cir.1990). District courts have only limited discretion to deny a party leave to amend the pleadings. *Espey v. Wainwright,* 734 F.2d 748 (11th Cir.1984); *Dussouy v. Gulf Coast Investment Corp.,* 660 F.2d 594 (5th Cir.1981). Thus, the Court is constrained to allow a plaintiff leave to amend unless there is substantial countervailing reason. *Id.* In determining whether to grant leave to amend, a court may consider undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and the futility of the amendment. Nolin, 903 F.2d at 1550 (citing *Foman v. Davis,* 371 U.S. 178, 182 [83 S.Ct. 227, 230, 9 L.Ed.2d 222] (1962)).

After reviewing the motion and responses in this action, the Court concludes that defendant has not demonstrated any substantial countervailing reasons to deny plaintiffs leave to amend and grants plaintiffs' motion to amend the complaint to add that the action is brought on behalf of other similarly situated individuals.

C. *Notice*

Plaintiffs have requested that the Court approve issuance of a notice to the potential additional plaintiffs informing them of their right to join in this action. In

Hoffman [Hoffmann]-La Roche, Inc. v. Sperling, 493 U.S. 165 [110 S.Ct. 482, 107 L.Ed.2d 480] (1989), the Supreme Court approved district court involvement in the notification process to potential opt-in members in an ADEA § 216(b) class action. The Supreme Court held that "district courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b), as incorporated by 29 U.S.C. § 626(b), in ADEA actions by facilitating notice to potential plaintiffs." *Id.* at 169 [110 S.Ct. at 485].

Defendant argues, however, that it should not be ordered to provide names and addresses of all store managers demoted in the southern Region during 1990-92 and those who resigned after notice of demotion, because only those former store managers who timely filed EEOC claims would be eligible to opt-in, under what defendant claims is binding precedent. *Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir.1977). The Court notes that the *Price* decision was rendered before the 1978 amendment to the ADEA concerning the notice requirement which has been interpreted by the courts as not requiring each plaintiff to have filed a timely administrative claim. *See Lusardi*, 855 F.2d at 1077; *see also, McCorstin*, 621 F.2d at 755. In addition, in cases filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., the Eleventh Circuit has adopted the "single filing" rule allowing a plaintiff who has not filed an EEOC claim to rely on another plaintiff's EEOC claim if the claim was timely and arose out of similar discriminatory treatment in the same time frame. *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 449-50 (11th Cir.1993). The purpose of the notification requirement in Title VII is analogous to that of the ADEA. Accordingly, the Court does not agree with

defendant that only those individuals that timely filed an administrative claim are eligible under § 216(b) and grants plaintiffs' motion that the Court approve issuance of a notice to the potential additional plaintiffs informing them of their right to join the action.

III. *SEVERANCE AND CHANGE OF VENUE*

For the reasons stated above for granting plaintiffs' motion to permit joinder of similarly situated additional plaintiffs under § 216(b), the Court denies defendant's motion for severance of the parties, for change of venue as to the Florida plaintiffs, and for severance of state law claims.

IV. *CONCLUSION*

In summary, the Court DENIES plaintiffs' motion to modify the confidentiality order [# 73]; GRANTS plaintiffs' motion to permit joinder of similarly situated additional plaintiffs [# 85-1]; GRANTS plaintiffs' motion for leave to amend complaint [# 85-2]; GRANTS plaintiffs' motion to authorize notice to potential additional plaintiffs [# 85-3]; DENIES defendant's motion for severance and change of venue [# 92]; GRANTS the motion to intervene as party plaintiffs of Mike Williams, Larry Good, and Robert Windell [# 84-2]; GRANTS the motion to intervene as party plaintiffs of Robert Defoe, Robert Ennis, Edna Portilla, and David Wright [# 88-1]; DENIES the motion to intervene as party plaintiff of Jerry Matson

[# 88-2]; and GRANTS, for the reasons stated in defendant's brief, defendant's motion for a protective order [# 82].

IT IS SO ORDERED, this 20 day of July, 1994.

/s/ Marvin H. Shoob
Marvin H. Shoob,
Senior Judge
United States District Court
Northern District of Georgia

Mercer David GRAYSON, Ronald L. Braley, Tony M. Arrington, Kenneth C. Bell, Edward J. Kondrad, James T. Mixon, David L. Navickas, Ricky D. Sallee, James L. Steadman, Mitchell B. Taper, and John D. Thompson, Plaintiffs,

v.

K-MART CORPORATION, Defendant.

Civ. No. 1:92-cv-141-JEC.

United States District Court,
N.D. Georgia,
Atlanta Division.

Feb. 22, 1994.

Former store managers for discount department store chain sued employer for age discrimination under Age Discrimination in Employment Act (ADEA) and for intentional infliction of emotional distress. On employer's motions for partial summary judgment, for severance of claims, and to strike, the District Court, Carnes, J., held that: (1) store managers failed to satisfy either "common transaction or occurrence" or "common question of law or fact" requirement for joinder of age discrimination claims, and (2) motions not mooted by severance could be refiled without prejudice.

Motions granted in part and denied in part.

Carl H. Hodges, Morrow, GA, Daniel M. Klein, James L. Ford, Atlanta, GA, James J. Dalton, II, Morrow, GA, for plaintiffs.

James H. Coil, III, Walter E. Johnson, Atlanta, GA, for defendant.

ORDER

CARNES, District Judge.

This case is presently before the Court on defendant's Motions for Partial Summary Judgment [54-1, 55-1, 56-1, 57-1, 58-1, 59-1, 60-1, 61-1, 62-1, 63-1, 64-1], defendant's Motion for Severance of each plaintiff's case [65-1], defendant's Motion for Severance of state and federal claims [65-3], defendant's Motion to Strike [99-1], and defendant's Motion to Strike [105-1]. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that defendant's motions should be granted in part and denied in part without prejudice to be refiled, as appropriate, within thirty (30) days of this order.

BACKGROUND

The eleven plaintiffs in this case are former store managers of defendant K Mart Corporation ("K Mart") who are, or were, employed in defendant's stores located in Alabama, Florida, Georgia, and North Carolina. Each plaintiff seeks relief for alleged age discrimination, pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* ("ADEA"). Each plaintiff also seeks relief for common law intentional infliction of emotional distress, pursuant to the applicable law of each plaintiff's home state.

Plaintiffs have alleged that each plaintiff was demoted by defendant due to the respective plaintiff's ages at the time of their demotions. In support of their claim, plaintiffs point to evidence they believe indicates

that each plaintiff was subjected to such adverse action as part of a "pattern and practice" of illegal treatment of K Mart's older employees at all levels. All the plaintiffs were over forty years of age at the time of the demotions and, thus, protected by the ADEA. Notwithstanding plaintiffs' allegations, defendant alleges that the employment decisions made regarding each plaintiff were made based upon the individual circumstances of each plaintiff's employment record and job performance. Plaintiffs, in turn, cite to evidence which tends to indicate that defendant's stated reasons for each employment decision are mere pretext.

Although the Complaint purported to include the claims of each of the eleven plaintiffs "and other similarly situated persons," (Compl. at ¶ 92), it was not brought as a class action, and plaintiffs have made no effort to seek representative status or to certify any proposed class. Prior to bringing the instant action, each plaintiff filed an individual complaint with the Equal Employment Opportunity Commission office in his respective state. At the time of the adverse employment actions complained of, pursuant to K Mart's management structure, each plaintiff reported to a district manager and regional manager located in each plaintiff's home state.[1] Each regional manager in turn reported to John Valenti in Troy, Michigan, who was in charge of the operations of some eight hundred K Mart stores in the Southern states.

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[1] Although plaintiff Thompson worked at a store located in Alabama at the time of the acts complained of, he reported to a Regional Manager located in Atlanta, Georgia.

DISCUSSION

I. *Introduction.*

Defendant has moved the Court to sever the claims of the various plaintiffs in this case, pursuant to FED.R.CIV.P. 21 and 42(b) ("Rule 21" and "Rule 42(b)"). Defendant argues that plaintiffs' cases were improperly joined and that defendant is entitled to have the claims severed under Rule 21 and, in the alternative, that, even if plaintiffs cases are properly joined, sufficient reason exists to sever each plaintiff's case for trial under Rule 42(b). Plaintiffs argue in response that joinder was proper under FED.R.CIV.P. 20 ("Rule 20") because their claims arose out a common "transaction, occurrence, or series of transactions or occurrences" and because there are "questions of law or fact common to all" the plaintiffs. *Id.* Plaintiffs further argue that any prejudice or confusion that may exist, due to their decision to join their claims under Rule 20, can be eliminated through proper instruction to the jury, thus eliminating any justification to sever under Rule 42(b). For the reasons discussed below, the Court concludes that, under the circumstances of these cases, defendant has presented the better argument and that defendant's motion to sever should be granted on either of its proposed alternative grounds.

II. *Misjoinder.*

In order for plaintiffs' cases to be properly joined, they must satisfy the prerequisites of FED.R.CIV.P. 20(a) ("Rule 20(a)"). "The rule states two requirements for proper joinder: (1) there must be a right to relief arising

out of the same transaction occurrence or series of transactions or occurrences; and (2) there must be a question of law or fact common to all of the plaintiffs which will arise in the action. Both these requirements must be satisfied." *Smith v. North Am. Rockwell Corp.*, 50 F.R.D. 515, 522 (N.D.Okla.1970) (hereinafter "*Rockwell*"). "In ascertaining whether a particular factual situation constitutes a single transaction or occurrence for purposes of Rule 20, a case by case approach is generally pursued. No hard and fast rules have been established under the rule." *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir.1974) (citation omitted). The Court finds, based upon the factual situation presented by these cases, that plaintiffs' cases satisfy neither requirement for joinder under Rule 20(a) and, thus, that their claims have been misjoined.

A. *Common Transaction or Occurrence.*

Defendant argues that plaintiffs' cases arise from distinct and unrelated employment actions taken by various management employees in the course of their job responsibilities. Accordingly, under defendant's theory of the cases, each adverse employment decision was a separate transaction or occurrence, not part of some unified series of transactions or occurrences, and not amenable to joinder under Rule 20(a). Plaintiffs argue vigorously that their pattern and practice evidence establishes that each plaintiff's demotion was part of an organized course of conduct by K Mart and, thus, that each demotion was but one transaction or occurrence within a common series of transactions or occurrences. Under plaintiffs' theory of their respective cases, the first prong of Rule 20(a) has been satisfied. While the Court finds the facts of these

cases to present a somewhat close question, it concludes that the "common transaction or occurrence" requirement of Rule 20(a) has not been satisfied.

In support of their theory of the cases, plaintiffs have directed the Court's attention to evidence they believe establishes the common transaction requirement under Rule 20(a). This evidence may be categorized into three general types: (1) evidence of motive to discriminate against older employees; (2) anecdotal evidence of age bias within defendant's organization; and (3) statistical evidence of age bias. Plaintiffs paint the picture of a hostile corporate culture for older store managers. Plaintiffs have not, however, directed this Court's attention to any discrete program or procedure employed by K Mart that affected each of the plaintiffs in this litigation.[2] Absent some causal link between a common and identifiable wrongful act on the part of the defendant and the adverse action taken with respect to each plaintiff, the first prong of Rule 20(a) is not satisfied.

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[2] Plaintiffs have alleged that a "20-40-60 Club" exists at K Mart. As plaintiffs describe this "club," it includes managers who have been with K Mart for approximately twenty years, who are approximately forty years of age, and who make approximately sixty thousand dollars per year. Plaintiffs' only evidence of the existence of this "club" is testimony by various employees, many of whom have claimed that K Mart discriminated against them because of their age and that they believed that employees who satisfied the three criteria were at an enhanced risk of suffering some adverse employment action. Without more, the Court cannot conclude that such a "club" existed, much less that some corporate policy or plan was responsible for its existence.

Plaintiffs' "motive" evidence relates to defendant's admitted need to improve its profitability during the same time period within which plaintiffs were demoted. Plaintiffs combine evidence that defendant was seeking to improve its profitability and evidence that older employees, on average, made higher salaries to arrive at the purported motive to act more harshly with respect to older employees. Plaintiffs allege that K Mart's demands of improved profitability put increased pressure on regional, district, and store managers to cut costs in order to improve profits. Plaintiffs assert that the need to cut costs caused these managers to make employment decisions based upon the relative costs of retaining one employee over another. In making this argument, however, plaintiffs ignore the fact that each employment decision was made by different managers within the company. The fact that all these managers may have been feeling the same pressure to improve profitability does not mean that all these decisions constitute one unified transaction or occurrence or series thereof.

The anecdotal evidence of discrimination consists of statements made by various K Mart managers at all levels, which plaintiffs assert establishes the existence of a company-wide policy of age bias. Plaintiffs rely in part on public statements made by defendant's chairman, Joseph Antonini, regarding the company's "renewal" and regarding the relatively young age of K Mart's management team to support the existence of such a policy. Plaintiffs also present the anecdotal testimony of various present and former K Mart employees recounting conversations they have had with managers at various levels in which pejorative or derogatory statements were made

regarding the age and job performance of other K Mart employees. Assuming, without deciding, that plaintiffs' evidence establishes a general hostility toward older employees, the Court fails to see how such hostility transforms the decisions of the various managers with respect to each of the plaintiffs into one logical transaction or occurrence.

Plaintiffs' reliance on defendant's alleged general bias toward store managers over forty to support joinder of their cases is misplaced, as "litigation of even any purported general policy of defendant, as it might affect each plaintiff here, would inevitably focus in detail on the separate work histories of each plaintiff." *Rockwell,* 50 F.R.D. at 522; *see also Weir v. Litton Bionetics, Inc.,* 41 Fair Empl.Prac.Cas. (BNA) 1150, 1986 WL 11608 (D.Md.1986) (accord). The instant cases involve eleven individuals who live in four states. Each plaintiff worked in a different store, geographically remote from the other plaintiffs. The decision to demote each plaintiff originated with his district manager and was derived within the context of the business circumstances of each plaintiff's store. Three different regional managers participated in the eleven demotion decisions at issue in these cases. While all of these decisions may not be completely unrelated, in that they were made during the same time period and in response to the immense competitive pressures being felt by K Mart at the time, they hardly constitute a single action on the part of the defendant.

Plaintiffs make much of defendant's centralized controls to support their theory that each demotion was part of one logical transaction or occurrence. Plaintiffs point to centralized policy-making and review and claim that

such control indicates that each plaintiff's local managers did nothing more than blindly implement company policy without exercising any independent judgment. Plaintiffs' assertions are not supported by the record. While the decisions to demote the plaintiffs could not have been implemented without approval by the Southern Regional Vice President, John Valenti, the undisputed evidence establishes that the recommendation to make such a demotion originated with the individual employee's district and regional managers. Taking plaintiffs' reasoning to its logical end, every employment decision made by managers subject to central policies and review would constitute one transaction or occurrence, and any group of aggrieved employees would be entitled to join its claims under Rule 20(a). The Court declines to read the permissive joinder rules so broadly.

Plaintiffs also offer statistical evidence to support their single transaction theory of the case. The Court fails to see, however, how this evidence transforms eleven individual employment decisions into one logical transaction. Primarily, plaintiffs seek to use their statistical evidence in order to create an inference of discrimination. Plaintiffs do not seek to use the evidence in order to establish their cases using a disparate impact theory; rather, they seek to use it as evidence of defendant's intent to discriminate against older employees. While such evidence possibly may be used by each of the plaintiffs to establish intent with respect to the adverse action taken against them, it seems ill-suited for satisfying the single transaction requirement of Rule 20(a). Thus, the Court concludes that plaintiffs' cases do not constitute

one logical transaction or occurrence for purposes of Rule 20(a).

B. *Common Question of Law or Fact.*

The Court further finds that no common question of law or fact exists between the plaintiffs' cases, within the meaning of Rule 20(a). "It is, of course, true that plaintiffs have alleged against defendant claims based upon the same general theories of law, but this is not sufficient." *Rockwell*, 50 F.R.D. at 524; *see also Anderson v. Phelps*, 655 F.Supp. 560 (M.D.La.1985) (accord); *Martinez v. Safeway Stores, Inc.*, 66 F.R.D. 446, 449 (N.D.Cal.1975) (accord). As detailed previously, each demotion decision affecting the plaintiffs in these cases was a discrete act by the defendant. "As indicated, the factual and legal questions between the plaintiffs and the defendant are based upon the wholly separate acts of the defendant with respect to each plaintiff. There is consequently a complete lack of common questions of fact or law, the second element required by Rule 20(a), and the action[s] must be severed on this ground as well." *Id.*

III. *Separate Trials under Rule 42(b).*

Defendant has argued, alternatively, that even if plaintiffs' cases were properly joined under Rule 20(a), it would be highly prejudicial to defendant for all the plaintiffs' cases to be presented to one jury. Plaintiffs argue that no undue prejudice to defendant exists, but that each plaintiff's case would be "prejudiced" by having to present evidence common to every case multiple times and because each plaintiff's case will appear more isolated to

the juries hearing their cases. For the reasons below, the Court concludes that it would be improper to conduct what essentially constitutes eleven mini-trials at once and that, even if plaintiffs' cases were properly joined, the extreme prejudice defendant would suffer from a joint trial warrants severance.

Rule 42(b) provides in pertinent part:

> **Separate Trials.** The court, in furtherance of convenience *or to avoid prejudice,* . . . may order a separate trial of *any claim,* cross-claim, counterclaim or third-party claim, or of any *separate issue or any number of claims,* cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

(Emphasis Added). As with determinations under Rule 20(a), "the Court is given broad discretion to decide whether or not" plaintiffs' cases should be tried separately. *Arroyo v. Chardon,* 90 F.R.D. 603, 605 (D.P.R.1981) (construing the consolidation provisions of FED.R.CIV.P. 42(a)); *see also Bernardi v. Scranton,* 101 F.R.D. 411 (M.D.Pa.1983) (accord). In making its determination, "the trial court must balance the probable savings of time and effort against the likelihood that a party might be prejudiced, inconvenienced or put to extra expense." *Bernardi,* 101 F.R.D. at 413. Having weighed the parties' arguments with respect to convenience, judicial economy, and prejudice, the Court concludes that any possible benefits to be derived from a common trial are more than offset by the

confusion to the jury and prejudice to the defendant from proceeding with these cases jointly.

Plaintiffs' primary argument in opposition to defendant's motion is that they will be inconvenienced and prejudiced by severance. Plaintiffs cite the increased expense and inconvenience of presenting essentially identical statistical evidence and expert testimony multiple times should their cases be severed. Likewise, plaintiffs complain about the added expense and inconvenience of presenting highly similar anecdotal evidence of defendant's alleged pattern and practice of discriminating against older employees. As a preliminary matter, the Court notes there are less costly alternatives to presenting live testimony in each trial and would encourage counsel for plaintiffs and defendant to reach a mutually agreeable alternative means for presenting redundant testimony in the various cases. Moreover, even assuming plaintiffs had no alternative to presenting the live testimony of their various witnesses, plaintiffs' convenience alone does not allow this Court to ignore the potential prejudice to defendant by proceeding with a consolidated trial of all the plaintiffs' cases.

Plaintiffs argue vigorously that they would be prejudiced by having to present, and prove, each plaintiff's case individually. Plaintiffs complain that defendant has pursued a litigation strategy to "divide and conquer," by seeking to focus the finder of fact's attention on the merits of each individual plaintiff's case, without the associated confusion of assessing the merits of ten other factual circumstances at the same time. Plaintiffs' argument is greatly misplaced.

Each plaintiff must prove liability on the part of the defendant with respect to the adverse action defendant took with respect to him. It is precisely this need to focus the jury's attention on the merits of each individual plaintiff's case that counsels against proceeding with these cases in one consolidated trial. There is a tremendous danger that one or two plaintiff's unique circumstances could bias the jury against defendant generally, thus, prejudicing defendant with respect to the other plaintiffs' claims. Contrary to plaintiffs' arguments, they are not "prejudiced" by having to prove defendant's liability to each plaintiff individually. The ADEA does not provide a right for one plaintiff to recover because a defendant may have discriminated against another plaintiff of like age.

Plaintiffs also argue that in the interest of judicial economy these cases should continue to be joined for trial. Plaintiffs argue that it would be a gross waste of judicial resources to conduct eleven separate trials when all claims could be dispensed with in one trial. Plaintiffs rely heavily on the common statistical and historical evidence in each of the cases to support their argument. The Court finds plaintiffs' argument regarding judicial economy unpersuasive. Plaintiffs completely ignore the complexities of conducting a trial which involves eleven largely unrelated events. While the logistical inefficiency of conducting such a trial may not completely offset the inefficiency of having repeated presentation of evidence, the Court concludes, given the other factors which weigh so heavily in favor of separation, that concerns about judicial efficiency do not preclude separation.

In these cases, there are eleven factual situations and eleven sets of witnesses with testimony pertinent to those

situations. Moreover, plaintiffs' state law claims arise under the laws of four different states. The resulting confusion and prejudice from the scenario presented by a common trial of all plaintiffs' claims against the defendant would be intolerable. Thus,

> [t]his Court concludes that it would be prejudicial to defendant were the claims of [the plaintiffs] to be tried at the same time. The work history of each plaintiff was quite different, and the claims and defenses of each can be fairly considered only in the light of the separate work history of each. . . . [P]laintiffs' claims will be tried before a jury, and it is highly likely that confusion will result when the different facts pertaining to these different claims are presented at a single trial. No prejudice can result to each plaintiff if each claim is tried separately, but the same cannot be said insofar as the defendant is concerned. This Court concludes that in view of the different facts which are pertinent to each of these . . . claims, defendant would suffer prejudice if the claims were tried together.

Weir v. Litton Bionetics, Inc., 41 Fair Empl.Prac.Cas. 1150, 1155, 1986 WL 11608 (D.Md.1986) (deciding defendant's motion for severance of two employees' ADEA claims under Rule 21). Accordingly, the Court concludes that defendant's motion for severance should be granted under either Rule 21 or 42(b).

IV. *Pattern and Practice Evidence and Separate Trials.*

In their opposition to severance, plaintiffs argue vigorously that severance would impair their ability to present pattern and practice evidence. To the extent

plaintiffs' arguments are oriented toward the cost of presenting such evidence on multiple occasions, the Court has addressed the arguments in its discussion of Rule 42(b). To the extent that plaintiffs' arguments relate to the cumulative impact of having eleven plaintiffs present their cases to one jury and the inferences a jury might draw with respect to the defendant because of the sheer number of plaintiffs, plaintiffs' arguments are ill-advised. While plaintiffs have been critical of defendant's litigation strategy for seeking to sever the cases, it appears to the Court that plaintiffs' own motives for seeking to join their claims are no less self-serving.

Plaintiffs have directed this Court's attention to no authority for the proposition that the number of plaintiffs joined in a lawsuit affects the admissibility of pattern and practice evidence in an employment discrimination context. Such evidence is controlled by the Federal Rules of Evidence regardless of whether each plaintiff's case is tried separately or tried together in one consolidated trial. Thus, plaintiffs' evidence of an alleged pattern and practice of age discrimination is admissible to the extent such evidence is relevant to each plaintiff's case. FED.R.EVID. 401, 402, 403 ("Rules 401, 402, and 403").

While the fact of similar demotions within the same time frame of any plaintiff's particular demotion may be relevant to such plaintiff's case under Rule 401, the "prejudice resulting from permitting each witness, who is the plaintiff in his own lawsuit, to testify about the circumstances of his [demotion, would] substantially outweigh[ ] the probative value of the testimony," under Rule 403. *Moorhouse v. Boeing Co.*, 501 F.Supp. 390, 392 (E.D.Pa.), *aff'd without op.*, 639 F.2d 774 (3d Cir.1980). The prejudice

to defendant and confusion to the jury from the presentation of such testimony is the overriding reason plaintiffs' cases must be severed at this juncture. *Id.* Thus, plaintiffs' concerns regarding their ability to present relevant, non-prejudicial, pattern and practice evidence, upon severance of these cases for trial, are unfounded.

CONCLUSION

For the foregoing reasons, defendant's Motions for Partial Summary Judgment [54-1, 55-1, 56-1, 57-1, 58-1, 59-1, 60-1, 61-1, 62-1, 63-1, 64-1] are **DENIED** without prejudice with leave to refile within thirty (30) days of this order, defendant's Motion for Severance of each plaintiff's case [65-1] is **GRANTED,** defendant's Motion for Severance of State and Federal claims [65-3] is **DENIED** without prejudice with leave to refile within thirty (30) days of this order, defendant's Motion to Strike [99-1] is **DENIED** as moot, and defendant's Motion to Strike [105-1] is **DENIED** as moot. Defendant may, at its option, adopt its previously filed motions with respect to any motion for which leave has been granted to refile. Defendant must, however, affirmatively notify the Court of such desire within thirty (30) days of this order. Plaintiffs are ordered to limit their responses to any renewed motion(s) for summary judgment that may be filed by the defendant to the facts relevant to each individual case.

Accordingly, the Clerk's Office is directed to establish separate case numbers for each plaintiff's case. Upon establishing new case numbers and files for each plaintiff's case, the Clerk's Office is directed to include each of the following docket entries in each of the plaintiff's files:

1-53, 65-85[3] and 97-134. The Clerk's Office is further directed to include any docket entry filed after February 8, 1994, and not included in this list, in each of the newly created case files.

The Clerk's Office is directed that plaintiff Grayson's case will be styled *Mercer David Grayson v. K Mart Corporation* and will continue to proceed under the presently assigned case number. In addition to the previously listed entries, the Clerk's Office is directed to include in plaintiff Grayson's case file docket entries: 54 and 96.

The Clerk's Office is directed that plaintiff Braley's case is to be assigned a new case number to be styled *Ronald L. Braley v. K Mart Corporation.* In addition to the previously listed entries, the Clerk's Office is directed to include in plaintiff Braley's case file docket entries: 55 and 95.

The Clerk's Office is directed that plaintiff Arrington's case is to be assigned a new case number to be styled *Tony M. Arrington v. K Mart Corporation.* In addition to the previously listed entries, the Clerk's Office is directed to include in plaintiff Arrington's case file docket entries: 56 and 94.

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[3] Although the Court has directed the Clerk's Office to include docket entry 65 in each plaintiff's case file, defendant's Motion for Change of Venue [65-2] is applicable only to plaintiff Bell's, plaintiff Kondrad's, plaintiff Mixon's, plaintiff Navickas's and plaintiff Taper's cases. Accordingly, only these dockets should reflect that such a motion is pending, once separate case files are established for each plaintiff in this litigation.

The Clerk's Office is directed that plaintiff Bell's case is to be assigned a new case number to be styled *Kenneth C. Bell v. K Mart Corporation.* In addition to the previously listed entries, the Clerk's Office is directed to include in plaintiff Bell's case file docket entries: 57 and 93.

The Clerk's Office is directed that plaintiff Kondrad's case is to be assigned a new case number to be styled *Edward J. Kondrad v. K Mart Corporation.* In addition to the previously listed entries, the Clerk's Office is directed to include in plaintiff Kondrad's case file docket entries: 58 and 92.

The Clerk's Office is directed that plaintiff Mixon's case is to be assigned a new case number to be styled *James T. Mixon v. K Mart Corporation.* In addition to the previously listed entries, the Clerk's Office is directed to include in plaintiff Mixon's case file docket entries: 59 and 91.

The Clerk's Office is directed that plaintiff Navickas's case is to be assigned a new case number to be styled *David L. Navickas v. K Mart Corporation.* In addition to the previously listed entries, the Clerk's Office is directed to include in plaintiff Navickas's case file docket entries: 60 and 90.

The Clerk's Office is directed that plaintiff Sallee's case is to be assigned a new case number to be styled *Ricky D. Sallee v. K Mart Corporation.* In addition to the previously listed entries, the Clerk's Office is directed to include in plaintiff Sallee's case file docket entries: 61 and 89.

The Clerk's Office is directed that plaintiff Steadman's case is to be assigned a new case number to be styled *James L. Steadman v. K Mart Corporation.* In addition to the previously listed entries, the Clerk's Office is directed to include in plaintiff Steadman's case file docket entries: 62 and 88.

The Clerk's Office is directed that plaintiff Taper's case is to be assigned a new case number to be styled *Mitchell B. Taper v. K Mart Corporation.* In addition to the previously listed entries, the Clerk's Office is directed to include in plaintiff Taper's case file docket entries: 63 and 87.

The Clerk's Office is directed that plaintiff Thompson's case is to be assigned a new case number to be styled *John D. Thompson v. K Mart Corporation.* In addition to the previously listed entries, the Clerk's Office is directed to include in plaintiff Thompson's case file docket entries: 64 and 86.

Counsel for all the parties are ordered to supply the Clerk of the Court with a copy of **ALL** of the pleadings necessary for the Clerk's Office to establish the individual files for each plaintiff as prescribed in the conclusion of this order, beginning with the last paragraph on page 17 and continuing through this page. Counsel are directed to supply these copies within **TEN (10) DAYS** of this order. NO EXTENSIONS WILL BE GIVEN. The costs of providing these copies are to be divided equally between the plaintiffs and the defendant.

SO ORDERED, this 18th day of February, 1994.

Kenneth C. BELL, Plaintiff,

v.

K MART CORPORATION, Defendant.

Edward J. KONDRAD, Plaintiff,

v.

K MART CORPORATION, Defendant.

James T. MIXON, Plaintiff,

v.

K MART CORPORATION, Defendant.

David L. NAVICKAS, Plaintiff,

v.

K MART CORPORATION, Defendant.

Mitchell B. TAPER, Plaintiff,

v.

K MART CORPORATION, Defendant.

Civ. Nos. 1:94-cv-459-JEC to 1:94-cv-462-JEC and 1:94-cv-465-JEC.

United States District Court,
N.D. Georgia,
Atlanta Division.

Feb. 25, 1994.

Individual employees of multistate employer brought action against employer under the Age Discrimination in Employment Act (ADEA). On employer's motion for change of venue to home states of each individual employee, the District Court, Carnes, J., held that age

discrimination action would be transferred for convenience of parties and witnesses and as being in interest of justice.

Motion granted.

Carl H. Hodges, Morrow, GA, James L. Ford, Ford & Felton, Atlanta, GA, James J. Dalton, II, Morrow, GA, Daniel M. Klein, Atlanta, GA, for plaintiffs.

James H. Coil, III, Edmund M. Kneisel, Walter E. Johnson, Kilpatrick & Cody, Atlanta, GA, for defendant.

ORDER

CARNES, District Judge.

This case is presently before the Court on defendant's Motions for Change of Venue [65-2]. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that defendant's motion should be granted.

BACKGROUND

The eleven plaintiffs in this case are former store managers of defendant K Mart Corporation ("K Mart") who are, or were, employed in defendant's stores located in Alabama, Florida, Georgia, and North Carolina. Each plaintiff seeks relief for alleged age discrimination, pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* ("ADEA"). Each plaintiff also seeks relief for common law intentional infliction of emotional

distress pursuant to the applicable law of each plaintiff's home state.

Plaintiffs have alleged that each plaintiff was subjected to some adverse employment action by defendant due to the respective plaintiff's age at the time of the adverse actions. In support of their claims, plaintiffs point to evidence they believe indicates that each plaintiff was subjected to such adverse action as part of a "pattern and practice" of illegal treatment of K Mart's older employees at all levels. All the plaintiffs were over forty years old at the time of the alleged adverse employment actions and, thus, protected by the ADEA. Notwithstanding plaintiffs' allegations, defendant alleges that the employment decisions made regarding each plaintiff were made based upon the individual circumstances of each plaintiff's employment record and job performance. Plaintiffs, in turn, cite to evidence which tends to indicate that defendant's stated reasons for each employment decision are mere pretext.

Although the Complaint purported to include the claims of each of eleven plaintiffs "and other similarly situated persons," (Compl. at ¶ 92), it was not brought as a class action, and plaintiffs have made no effort to seek representative status or to certify any proposed class.[1] Prior to bringing the instant action, each plaintiff filed an

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[1] These plaintiffs' cases were originally filed as one lawsuit. Pursuant to prior order of the Court, however, each plaintiff's case has been severed from the others. References in this order to the "Complaint" refer to the consolidated complaint filed in the original lawsuit.

individual complaint with the Equal Employment Opportunity Commission office in his respective state. According to the allegations in the Complaint, the plaintiffs reside as follows:

Plaintiff	Residence
Bell	Jacksonville Beach, Fl.
Kondrad	Fayetteville, N.C.
Mixon	St. Petersburg, Fl.
Navickas	Castleberry, Fl.
Taper	Raleigh, N.C.

The plaintiffs still reside in the same locales as they did at the time of the acts complained of in the Complaint. The stores to which the plaintiffs were assigned are likewise near their current places of residence and in their respective home states. At the time of the adverse employment actions complained of, pursuant to K Mart's management structure, each plaintiff reported to a District Manager and Regional Manager located in each plaintiff's home state.[2] K Mart is a Michigan corporation presently doing business in all four states in which the plaintiffs reside.

DISCUSSION

I. *Introduction.*

In its motions currently before the Court, defendant seeks to change venue with respect to plaintiffs Bell, Kondrad, Mixon, Navickas, and Taper pursuant to 28

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[2] Although plaintiff Thompson worked at a store located in Alabama at the time of the acts complained of, he reported to a Regional Manager located in Atlanta, Georgia.

U.S.C. 1404(a).[3] Defendant argues that the Northern District of Georgia is an inconvenient forum for trying the cases of the Florida and North Carolina plaintiffs, as virtually all the witnesses with personal knowledge regarding these plaintiffs' cases, including the plaintiffs themselves, live and work near each plaintiff's respective place of residence. Defendant has presented evidence that none of these witnesses lives or works anywhere in Georgia. Plaintiffs argue, in response, that all the plaintiffs' claims share common statistical and pattern and practice evidence which could be presented once in one location if the cases had remained joined. Plaintiffs further argue that any inconvenience to the parties and witnesses caused by having the trial at a distant location is mitigated by the fact that some of the witnesses travel as part of their jobs anyway. Plaintiffs have argued that their choice of venue is paramount to this Court's determination but have presented no evidence tending to demonstrate inconvenience to the parties or witnesses by transferring venue.

For the reasons discussed below, the Court conclude [sic] that it should grant defendant's motion for change of

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[3] It is unclear from the pleadings why defendant objects to the Northern District of Georgia as an inappropriate venue for the Florida plaintiffs' (Bell, Mixon and Navickas) and North Carolina plaintiffs' (Kondrad and Taper) cases but does not object to venue with respect to the Alabama plaintiff's (Thompson) case 1:94-CV-466-JEC. The same factors considered with respect to transferring the Florida and North Carolina plaintiffs' cases would also be considered with respect to transferring the Alabama plaintiff's case.

venue with respect to the Florida and North Carolina plaintiffs' cases.

II. *Change of Venue.*

Defendant has moved the Court, pursuant to 28 U.S.C. § 1404(a) ("§ 1404(a)"), to transfer venue with respect to the Florida and North Carolina plaintiffs. Plaintiffs oppose this motion by arguing that venue is proper in the Northern District of Georgia pursuant to 28 U.S.C. § 1391(c) and that defendant has failed to make a sufficient showing to disturb plaintiffs' choice of forum. Defendant does not dispute that venue is currently proper; rather, it argues that the current venue is exceedingly inconvenient and that the plaintiffs impacted by their motion to change venue have no contacts with the present forum. The Court concludes that the present forum is inconvenient for the parties and the witnesses and, thus, that it should grant defendant's motion to change venue in these plaintiffs' cases.

Defendant relies on 28 U.S.C. § 1404(a) to support its motion for a change of venue with respect to the Florida and North Carolina plaintiffs. Section 1404(a) provides that:

> [f]or the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

This "change of venue statute applies by its express terms to 'any civil action,' which would include an action under the ADEA." *Adkins v. Kellwood Co.*, 36 Fair Empl.Prac.Cas.

(BNA) 1062 (W.D.N.C.1984). When seeking a change of venue pursuant to § 1404(a), "[t]he movant has the burden of making a strong case for transfer and if the transfer would merely shift inconvenience from one party to the other, or if the balance of all factors is but slightly in favor of the movant, plaintiff's choice of forum should not be disturbed and transfer should be denied." *Grey v. Continental Marketing Associates, Inc.*, 315 F.Supp. 826, 831 (N.D.Ga.1970) (Edenfield, J.) (footnote omitted). In these cases, defendant has carried its burden.

"Section 1404(a) establishes three general criteria upon which a transfer motion is to be determined: (1) the convenience of the parties; (2) the convenience of witnesses; and (3) the interest of justice." *Delay & Daniels, Inc. v. Allen M. Campbell Co.*, 71 F.R.D. 368, 371 (D.S.C.1976). These factors have been analyzed many times before and, in these cases, clearly indicate that transfer is proper.

1. *Convenience of the Parties.*

With respect to the first criterion, defendant's undisputed evidence establishes that none of these plaintiffs resides in or near the Northern District of Georgia and that their respective causes of action did not arise in the district. Further, the defendant is a Michigan corporation with its principal place of business in Troy, Michigan.

In response to defendant's motion, plaintiffs argue that transferring the Florida and North Carolina cases to their respective home venues would inconvenience the parties by multiplying the number of cases. Essentially, plaintiffs complain that they would be "inconvenienced"

because their individual costs of litigation may be increased if defendant's motion is granted. Plaintiffs' argument is misplaced. This argument is more relevant to defendant's motion for severance than to the motion for transfer, and for the reasons stated in its order of February 22, 1994, the Court has determined that defendant's motion for severance should be granted. Plaintiffs' argument also overlooks the increased practical difficulties and costs associated with trying a case where none of the parties or witnesses resides, as well as the tremendous cost and disruption to K Mart should it be required to bring *every* witness with personal knowledge of plaintiffs' cases from out of state. Moreover, should plaintiffs prevail in their respective cases, they are entitled to recover reasonable attorney fees and costs of the action. 29 U.S.C. § 626(b); *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86 (2d Cir.1983).

To the extent that plaintiffs argue they would be inconvenienced by a change of venue because of additional logistical difficulties on the part of their counsel, their argument falls short. It is well established that "the fact that counsel may be inconvenienced is [almost] irrelevant to whether the motion for transfer should be granted." *Prather v. Raymond Constr. Co.*, 570 F.Supp. 278, 284 (N.D.Ga.1983) (Ward, J.). In short, plaintiffs have put forth no evidence that tends to support their arguments that it would be more convenient for any party to conduct the trials in the Northern District of Georgia rather than the district nearest their respective homes.

2. *Convenience of the Witnesses.*

The undisputed evidence, introduced by defendant, indicates that every witness with personal knowledge of the circumstances surrounding each of the Florida and North Carolina plaintiff's demotion lives and works outside the state of Georgia. With the exception of defendant's witnesses Valenti and Antonini, who live and work in Michigan, all the fact witnesses in each of these cases live and work in each plaintiff's state of residence. Plaintiffs argue that defendant has overstated the degree of witness inconvenience, as some of the witnesses "are perfectly accustomed to regular travel because that is precisely what they do for Kmart." (Pls.' Mem. in Opp'n to Def.'s Mot. for Change of Venue at 199).

Plaintiffs' argument is meritless under the circumstances of their cases. Although some of the witnesses identified in defendant's affidavits in support of its motion do travel as part of their work, the travel does not include trips to Atlanta, Georgia. The K Mart employees plaintiffs allude to are regional and district managers whose geographic territories of responsibility are limited to their respective home states. Moreover, a large majority of the more than twenty witnesses identified by defendant are employees who are assigned to a single store near the plaintiffs' respective homes and do little or no traveling on behalf of K Mart. Regardless of the travel requirements of their jobs, transferring venue to one near these witnesses' homes and work responsibilities "will benefit the witnesses by reducing the amount of time that they will be away from their families and jobs when appearing at trial." *Jones v. Nabisco, Inc.*, 26 Fair Empl.Prac.Cas. (BNA) 233, 235 (D.S.C.1981).

As with the first criterion, plaintiffs have presented no evidence to this Court tending to show that the witnesses in each plaintiff's case would be inconvenienced by granting defendant's motion to change venue. Quite the contrary, the undisputed evidence establishes that moving these cases to districts in the plaintiffs' respective home states would be more convenient for all the witnesses, including the plaintiffs themselves.

3. *Interest of Justice.*

Defendant's primary argument with respect to the third criterion is that justice is better served by determining plaintiffs' state law claims in a forum located in the plaintiffs' respective states of residence. Plaintiffs argue that the interests of justice may be equally served in any federal forum which is bound to apply the law of each plaintiff's state to his state law tort claims. While plaintiffs are correct with respect to any federal court's obligation to apply the substantive law of each plaintiff's home state as it applies to that plaintiff's state law claims, their argument fails to take into account that " 'there is an appropriateness . . . in having the trial . . . in a forum that is at home with the state law that must govern the case.' " *Delay & Daniels*, 71 F.R.D. at 373 (citations omitted in original).

Plaintiffs' arguments also overlook the public interests of justice that are served by transferring these cases to the localities in which they arose. As noted by the

Supreme Court in its application of the doctrine of forum non conveniens:[4]

> Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of the community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). Plaintiffs have failed to persuade the Court that the interests of justice would be served by deciding their cases in a forum so completely unrelated to any of the parties or plaintiffs' causes of action. There simply is no justification for preventing these cases to be decided within the communities most impacted by the alleged misdeeds of the defendant. Likewise, there is no justification for imposing the burden of deciding plaintiffs' cases upon a community which has no relation to the litigation.

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[4] While the district court's discretion is broader in applying § 1404 than it is in applying the doctrine of forum non conveniens, the relevant factors to be considered by the court are the same. *Norwood v. Kirkpatrick*, 349 U.S. 29, 75 S.Ct. 544, 99 L.Ed. 789 (1955).

4. *Plaintiffs' Choice of Forum.*

Plaintiffs' primary opposition to defendant's motion is their "presumed right to have a case decided in the venue" they chose. (Pls.' Mem. in Opp'n to Def.'s Mot. for Change of Venue at 199). As defendant has pointed out, "[h]owever, where the Plaintiffs' choice of forum lacks any significant connection with the underlying claim[,] Plaintiffs' choice of forum is entitled to reduced weight." Adkins, 36 Fair Empl.Prac.Cas. (BNA) at 1062; *see also Burns v. Thompson Indus., Inc.*, 32 Fair Empl.Prac.Cas. (BNA) 1860 (N.D.Ga.1983) (Vining, J.) (accord). Plaintiffs' claims could hardly be less related to the Northern District of Georgia.

As detailed above, there is little evidence before the Court that counsels against transferring these plaintiffs' cases, other than plaintiffs' decision to file in this Court. Plaintiffs' choice alone simply does not outweigh the factors that strongly weigh in favor of transferring their cases. Accordingly, the Court concludes that defendant's motion for change of venue should be granted.

CONCLUSION

For the foregoing reasons, defendant's Motion for Change of Venue [65-2] is **GRANTED.**

The Clerk is directed to transfer the action of Kenneth C. Bell, 1:94-CV-459-JEC, to the United States District Court for the Middle District of Florida, Jacksonville Division.

The Clerk is directed to transfer the action of Edward J. Kondrad, 1:94-CV-460-JEC, to the United States District

Court for the Eastern District of North Carolina, Fayetteville Division.

The Clerk is directed to transfer the action of James T. Mixon, 1:94-CV-461-JEC, to the United States District Court for the Middle District of Florida, Tampa Division.

The Clerk is directed to transfer the action of David L. Navickas, 1:94-CV-462-JEC, to the United States District Court for the Middle District of Florida, Orlando Division.

The Clerk is directed to transfer the action of Mitchell B. Taper, 1:94-CV-465-JEC, to the United States District Court for the Eastern District of North Carolina, Raleigh Division.

SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-9257

MERCER DAVID GRAYSON, Plaintiff-Appellee, Cross-Appellant,

versus

K MART CORPORATION, Defendant-Appellant, Cross-Appellee.

RONALD L. BRALEY, Plaintiff-Appellee, Cross-Appellant,

versus

K MART CORPORATION, Defendant-Appellant, Cross-Appellee.

TONY M. ARRINGTON, Plaintiff-Appellee, Cross-Appellant,

versus

K MART CORPORATION, Defendant-Appellant, Cross-Appellee.

RICKY D. SALLEE, Plaintiff-Appellee, Cross-Appellant,

versus

K MART CORPORATION, Defendant-Appellant, Cross-Appellee.

JAMES L. STEADMAN, Plaintiff-Appellee, Cross-Appellant,

versus

K MART CORPORATION, Defendant-Appellant, Cross-Appellee.

JOHN D. THOMPSON, Plaintiff-Appellee, Cross-Appellant,

versus

K MART CORPORATION, Defendant-Appellant, Cross-Appellee.

94-9293

OBEDIAH SCONIERS, et al, Movants,

CARL HELTON, CHARLES W. KEMPTON, JAMES E. TAYLOR, BOB WILLIAMS, DAVID JACK WRIGHT, Plaintiffs-Appellees,

versus

K MART CORPORATION, Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

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(Filed June 17, 1996)

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: TJOFLAT, Chief Judge, and DYER and GARTH*, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Tjoflat
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

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*Honorable Leonard I. Garth, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

STATUTES INVOLVED

Fair Labor Standards Act of 1938: 29 U.S.C. § 216(b)

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a

complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 626(b), (c) and (d)

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate

to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed –

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

MOTION FILED
AUG 16 1996

No. 96-98

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

K MART CORPORATION,
Petitioner,
v.
CARL HELTON, CHARLES W. KEMPTON, NICK PAYNE, JAMES E. TAYLOR, BOB WILLIAMS, and DAVID JACK WRIGHT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) and the Chamber of Commerce of the United States of America (the Chamber) respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of K Mart Corporation, Petitioner, whose written consent has been provided to the Clerk of the Court.

Counsel for Respondents, Daniel Klein, after being asked, has not consented. Because all parties have not consented, a motion to file this brief is required.

In support of this motion, EEAC and the Chamber, by the following, show that their brief brings relevant matters to the attention of this Court that have not been presented by the parties.

1. EEAC is a voluntary association of employers organized to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC has a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 215,000 businesses and organizations and serves as the principal voice of the American business community.

3. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

4. The members of EEAC and the Chamber are employers subject to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, (ADEA) as well as other employment laws and regulations. Due to changing business circumstances in recent years, many companies that are members of EEAC and the Chamber have had to implement reductions in force affecting substantial numbers of employees, or, like the employer in this case, have had to institute performance-based demotions in order to remain a viable business. As a result, many have faced litigation of the sort that frequently arises from large-scale workforce reductions or demotions, including discrimination charges and lawsuits filed under the ADEA. Thus, EEAC and the Chamber have an interest in the procedures under which ADEA cases are litigated.

5. In the instant case, the Eleventh Circuit adopted a new, permissive interpretation of the "similarly situated" requirement for use of the representative class action procedure permitted under the ADEA. This new standard would make the ADEA's representative action procedure available to challenge virtually every corporate workforce reduction, even where the individual plaintiffs' claims involve widely disparate factual situations and require particular, different and sometimes unique defenses. The members of EEAC and the Chamber are concerned that such a liberal interpretation would lead to insurmountable complications in the management and trial of ADEA cases and ultimately would deprive employers of due process, particularly for large, national corporations.

6. The issues presented in this appeal, therefore, are extremely important to the nationwide employer

constituency that belongs to EEAC and the Chamber. Because of its interest in such issues, EEAC has filed *amicus curiae* briefs in a number of other cases involving procedures and standards under the ADEA and other statutes. *E.g., Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989) (scope of federal court's discretion to facilitate notice to potential plaintiffs in representative class actions under ADEA); *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) (definition of "willful" violation under ADEA); *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) (proper class representative under Title VII); *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990), *cert. denied*, 499 U.S. 983 (1991) (right of would-be plaintiffs who have not filed timely ADEA charges to "piggyback" on the timely charges of others and then file an ADEA lawsuit). The Chamber also has filed *amicus curiae* briefs in cases involving procedures and standards under the ADEA and other statutes. *E.g., Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993), *McKennon v. Nashville Banner Pub. Co.*, 63 U.S.L.W. 4104 (U.S. Jan. 24, 1995) (application of the after-acquired evidence doctrine as applied to the ADEA), *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985) (standard for computing double damages under ADEA), and *MCLR Radio Station v. Rengers*, 486 U.S. 1020 (1986) (damages under ADEA).

7. Thus, EEAC and the Chamber have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their experience in these matters, EEAC and the Chamber are well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

This brief is timely as it is being filed within the time allowed in Supreme Court Rule 37.2 for filing a brief in support of the petition for writ of certiorari.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully request that the Court grant them leave to file a brief as *amici curiae* in this case in support of Petitioners.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) and the Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae*, contingent on the granting of the accompanying motion for leave. The brief supports the petition for writ of certiorari.

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici curiae* is set forth fully in the preceding motion.

STATEMENT OF THE CASE

On January 17, 1992, eleven plaintiffs filed *Grayson v. K Mart*, Civil Action No. 1:92-CV-141-JEC (N.D. Ga.), before District Court Judge Julie Carnes in the Northern District of Georgia. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1090 (11th Cir. 1996). On October 29, 1992, five different plaintiffs filed *Helton v. K Mart*, Civil Action No. 1:92-CV-2564-MHS (N.D. Ga.), before District Court Judge Marvin Shoob, also in the Northern District of Georgia. *Id.* The plaintiffs in both cases were store managers in K Mart's Southern Region who were demoted or terminated by K Mart between 1990 and 1992. *Id.* They alleged that their demotions or terminations were motivated by age discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (the ADEA). *Id.*

K Mart's Southern Region covers approximately 700 stores in eighteen states, Puerto Rico, and the Virgin Islands. *Id.* at 1091. It is subdivided into five sub-regions, each of which is headed by a regional manager. *Id.* Each sub-region is divided into districts of about ten to sixteen stores, and each district has its own district manager. *Id.*

Each of the *Helton* plaintiffs worked in a different store and reported to a different district manager. Pet. App. at 6. Three of them worked in Florida and reported to a different regional manager than the other two, who worked in Georgia. *Id.* The eleven *Grayson* plaintiffs worked in K Mart stores in Alabama, Florida, Georgia and North Carolina. *Id.*

After completion of discovery, Judge Carnes ruled that the claims of the eleven plaintiffs in *Grayson* were not properly joined under Fed. R. Civ. P. 20

and should be severed for separate proceedings in accordance with Fed. R. Civ. P. 42(b). *Grayson v. K Mart Corp.*, 849 F. Supp. 785 (N.D. Ga. 1994); Pet. App. at 4. Subsequently, Judge Shoob granted motions converting the *Helton* case into an opt-in class under 29 U.S.C. § 216(b) and allowing the plaintiffs to amend their complaint to specify that their action was being brought on behalf of both the named plaintiffs and others "similarly situated.". 79 F.3d at 1092. All of the *Grayson* plaintiffs then opted-in to the *Helton* case. *Id.*

Upon the interlocutory appeal of Judge Shoob's "class action" ruling, the Eleventh Circuit held that the plaintiffs met the "similarly situated" requirement of § 216(b).[1] *Id.* at 1095. In so holding, the court declared that the "similarly situated" requirement is "considerably less stringent than the requirement [for a class action under Rule 23(b)(3), Fed. R. Civ. P.] that common questions 'predominate' or . . . the [requirement for joinder under Rule 20(a) Fed. R. Civ. P.] that the claims arise out of the same action or occurrence.'" *Id.* at 1096. The Eleventh Circuit subsequently denied K Mart's Petition for Rehearing and Suggestion of Rehearing en Banc.

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[1] Section 216(b) provides, in part:

> An action to recover the liability prescribed . . . may be maintained against any employer in any Federal or State court of competent jurisdiction against by any one or more employees for and in behalf of himself or themselves and *other employees similarly situated.* No employees shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which the action is brought....

29 U.S.C. § 216(b) (emphasis added).

Pet. App. at 6. K Mart then filed the instant petition for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The issue raised by the petition is whether the ADEA's opt-in "representative action" procedure will be available as a matter of right virtually any time plaintiffs allege that an employer has engaged in a pattern of age discrimination when implementing performance-based demotions or workforce reductions. The availability of the representative action procedure turns on whether the plaintiffs are "similarly situated" within the meaning of Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which is incorporated into the ADEA by Section 7(b), 29 U.S.C. § 626(b). In dispute is the meaning of the phrase "similarly situated."

The Eleventh Circuit declared that "the 'similarly situated' requirement of § 216(b) is more elastic and less stringent than the requirements found in Rule 20 (joinder) and Rule 42 (severance)" and that "a unified policy, plan or scheme of discrimination may not be required to satisfy the more liberal 'similarly situated' requirement of § 216(b)." EEAC and the Chamber submit that this liberalized construction of the Section 216(b) representative class procedure is contrary to decisions of this Court and of other circuits and is contrary to the spirit and meaning of the ADEA. Therefore certiorari should be granted.

REASONS FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT'S HOLDING THAT THIS AGE DISCRIMINATION CASE SHOULD PROCEED TO TRIAL AS A REPRESENTATIVE ACTION UNDER 29 U.S.C. § 216(b) CONFLICTS WITH THIS COURT'S HOLDING IN *HOFFMAN-LA ROCHE* AND WITH THE DECISIONS OF OTHER CIRCUITS

The central issue raised by the petition is whether the ADEA's opt-in "representative action" procedure will be available as a matter of right virtually any time plaintiffs allege that an employer has engaged in a pattern of age discrimination when implementing performance-based demotions or, as is the case with many large employers, workforce reductions.[2] The availability of the representative action procedure turns on whether the plaintiffs are "similarly situated" within the meaning of Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which is incorporated into the ADEA by Section 7(b), 29 U.S.C. § 626(b). In dispute is the meaning of the phrase "similarly situated" in the context of cases such as these.

Respondents argue, in effect, that all persons allegedly affected by the same general "pattern of dis-

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[2] It is important to recognize that the procedure in question in this case differs significantly from the Federal Rule of Civil Procedure 23 process used in class actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* In Rule 23 actions, individual claimants other than the class representative generally are not even identified until a "stage two" remedial proceeding. In contrast, under the FLSA/ADEA representative action procedure, claimants identify themselves by affirmatively "opting-in" to the suit, and the court must determine, after discovery and before trial on the merits, whether they are "similarly situated" to the plaintiffs who filed the action.

crimination" involving demotions are "similarly situated" for these purposes, regardless of any differences that might exist between their specific circumstances, the nature of their claims, and/or the employer's defenses. The district court in *Grayson v. K Mart*, recognized, in granting severance of the claims of the eleven plaintiffs in that case, that their claims of age discrimination presented "eleven factual situations and eleven sets of witnesses with testimony pertinent to those situations." 849 F. Supp. at 791. Thus, the *Grayson* court determined that: (1) the issues to be tried in the case were too varied to permit a finding that the plaintiffs were similarly situated; and (2) joining the plaintiffs' cases in order to attack performance-based demotions as disparate as K Mart's would promote chaos rather than efficiency. EEAC and the Chamber submit that the district court's decision in *Grayson* comports fully with the intent of the ADEA and with sound public policy.

The *Helton* court and the Eleventh Circuit, however, ignored the plaintiffs' different geographical locations, different worksites, and different supervisors, and instead found the plaintiffs to be "similarly situated." The Eleventh Circuit declared that "the 'similarly situated' requirement of § 216(b) is more elastic and less stringent than the requirements found in Rule 20 (joinder) and Rule 42 (severance)" and that "a unified policy, plan or scheme of discrimination may not be required to satisfy the more liberal 'similarly situated' requirement of § 216(b)." EEAC and the Chamber submit that this liberalized construction of the Section 216(b) representative class procedure is contrary to decisions of this Court and of other circuits and is contrary to the spirit and

meaning of the ADEA. Therefore certiorari should be granted.

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS HOLDING THAT THE ADEA'S "OPT-IN" CLASS ACTION PROCEDURE IS APPROPRIATE FOR USE ONLY WHEN THE PLAINTIFFS' CLAIMS ARISE FROM THE "SAME ALLEGED DISCRIMINATORY ACTIVITY" AND USE OF THAT PROCEDURE WOULD PROMOTE "EFFICIENT RESOLUTION" OF THE CASE

Neither the ADEA nor the FLSA defines the phrase "similarly situated" in the context of cases such as these. In *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989), however, this Court observed that the purpose of the representative action procedure is to promote "*efficient* resolution in one proceeding of common issues of law and fact arising from *the same alleged discriminatory activity*." *Id.* at 173 (emphasis added). Justice Scalia, in a dissenting opinion in which Chief Justice Rehnquist joined, observed further that it is the district court's "duty" to determine whether the would-be plaintiffs are "*in fact* 'similarly situated' " before permitting a case to proceed as a representative action. *Id.* at 177. Thus, this Court already has indicated that, in determining whether prospective plaintiffs are "similarly situated" enough to warrant use of the representative action procedure, the district court must look to the specific employment actions or "activities" that are the basis for the plaintiffs' claims and determine how similar they are in fact.

At issue in this case is whether individuals whose only common attributes are that they are 40 years of age or older and were demoted or terminated from

positions as managers in K Mart stores scattered across various southern states, are sufficiently "similarly situated" to warrant use of the § 216(b) class action procedure. The plaintiffs may meet this burden only by making "substantial allegations that the putative class members were together the victims of a single decision, policy or plan infected by discrimination." *Sperling v. Hoffmann-La Roche, Inc.*, 118 F.R.D. 392, 407 (D.N.J. 1988) *aff'd*, 862 F.2d 439, *aff'd*, 493 U.S. 165 (1989). When plaintiffs are challenging the *same* employment decision, practice, policy, or other activity, then it may be efficient to try their claims collectively, rather than separately. But if the plaintiffs' claims grow out of *different* employment actions or "activities," they are not "similarly situated" and a collective trial is not likely to be an efficient way to proceed, even if there are some common issues of law or fact involved.

It is particularly appropriate in the context of a reduction-in-force or a performance-based demotion for a court to consider the details of the prospective plaintiffs' individual claims, insofar as they have been revealed through discovery, in determining whether or not the plaintiffs are "similarly situated." The selection of individuals to be terminated during workforce reductions or demoted during performance-based evaluations typically involves individualized decisions by separate managers and supervisors. Even where a corporation has established general procedures or guidelines to be used by its supervisors in implementing workforce reductions, it usually is the implementation of those procedures in particular instances that is alleged to be discriminatory, rather than any corporate-wide decision or policy applied in rote fashion to a whole class or cate-

gory of employees.[8] In such circumstances, it cannot properly be said that all individual discrimantion claims growing out of a reduction in force arise from the "same alleged discriminatory activity." *Sperling*, 493 U.S. at 170.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER COURTS BECAUSE IT IMPROPERLY IDENTIFIED AND APPLIED THE FACTORS RELEVANT TO DETERMINING WHETHER PROSPECTIVE PLAINTIFFS ARE "SIMILARLY SITUATED" WITH RESPECT TO THE ISSUES RAISED BY AGE DISCRIMINATION CLAIMS IN THE CONTEXT OF LARGE-SCALE CORPORATE PERFORMANCE-BASED DEMOTIONS

Several federal courts have interpreted and applied the "similarly situated" standard of 29 U.S.C. § 216(b). In doing so, courts prior to the Eleventh Circuit's decision in this case consistently focused not just on the plaintiffs' claims, but on the entire range of issues that would have to be litigated in the case if the representative action procedure were used at trial, including issues raised by the employer's defenses. *See Mooney v. Arabian Am. Oil Company*, 54 F.3d at 1214 (5th Cir. 1995) (plaintiffs were not similarly situated because they had vastly disparate employment situations, they were employed in at

[8] Collective litigation of age discrimination claims growing out of workforce reductions and demotions, therefore, is likely to be far more complex than, for example, litigation of the typical FLSA claims for which the representative action procedure was originally designed. In FLSA class actions, the challenged action typically is a substandard pay rate or an improper overtime practice that may have been applied across-the-board in a rote manner to a whole class or category of employees.

least 93 different departments, and they had different job tenure, employment history, salary grade, qualifications, and education); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), *appeal dismissed, mandamus granted in part, sub nom. Lusardi v. Lechner*, 855 F.2d 1062 (3d Cir.), *decertification adhered to after mandamus*, 122 F.R.D. 463 (D.N.J. 1988), *claim dismissed*, 58 Fair Empl. Prac. Cas. (BNA) 1049 (D.N.J. 1991), *aff'd*, 975 F.2d 964 (3d Cir. 1992) (decertification of class of plaintiffs in ADEA case necessary where members of proposed class came from different departments, groups, organizations, suborganizations, units, and local offices, performed different jobs at different geographic locations, were subject to different job actions concerning reductions in work force which occurred at various times as result of decisions by different supervisors made on a decentralized employee-by-employee basis); *Ulvin v. Northwestern Nat'l Life Ins. Co.*, 141 F.R.D. 130 (D. Minn.), *aff'd on other grounds*, 943 F.2d 862 (8th Cir. 1991), *cert. denied*, 112 U.S. 970 (1992) (decertification of class in ADEA action required where employees varied significantly as to age, year of discharge, type of discharge, division in which they worked, offices in which they worked, supervisors and salaries). In one recent case, the U.S. District Court for the Northern District of Texas observed:

> What is seen here is 'a monster that no one can deal with, made with a lot of individual people with specific grievances.' There is no single, company-wide action but, rather, layoffs by various supervisors of persons, on an employee by employee basis, of widely disparate ages, salaries, and positions over a two year period of time. The factual and/or employment setting of each person's layoff is different, many vary-

> ing questions of law are raised, and the defenses posited are individual to each or small groups of those persons. And while this action alleges that the putative class was adversely affected by a pattern or practice of discriminatory treatment, no such pattern or practice is the least bit evident. Indeed, the only common thread seen here is that the persons involved were forty years old or older and were laid off by MCII. That is clearly not enough.

EEOC v. MCI Int'l, 829 F. Supp. 1438, 1446 (D.N.J. 1993).

As this Court has recognized, the purpose of the representative action procedure in the scheme of the ADEA is to promote efficiency in the trial of ADEA issues. *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. at 170. A court cannot make a reasoned judgment that the representative action procedure will enhance efficiency in the trial of a case by looking myopically only at whether there is some common thread running through the plaintiffs' claims, such as generalized assertions that age discrimination occurred during a performance-based demotion or a reduction in force. Rather, the court must consider the whole gamut of issues expected to be litigated at the trial. Only then can the court reasonably determine whether the plaintiffs are, in fact, similarly situated with respect to the issues to be litigated. Likewise, only by looking at the full set of issues expected to be litigated can the court determine whether the representative action procedure will promote efficiency in the handling of the case.

The Eleventh Circuit neglected to consider these factors when rendering its decision. The district court in *Grayson*, however, did take these factors into

account in making the decision to separate the eleven plaintiffs' cases. The district court concluded that joining the plaintiffs eleven separate cases "[e]ssentially constitutes eleven mini-trials at once and that, even if the plaintiffs' cases were properly joined, the extreme prejudice defendants would suffer from a joint trial warrants severance." *Grayson*, 849 F. Supp. at 789. As for judicial economy,

> The Court finds plaintiffs' argument regarding judicial economy unpersuasive. Plaintiffs completely ignore the complexities of conducting a trial which involves eleven largely unrelated events. While the logistical inefficiency of conducting such a trial may not completely offset the inefficiency of having repeated presentation of evidence, the Court concludes, given the other factors which weigh so heavily in favor of separation, that concerns about judicial efficiency do not preclude separation.

Id. at 790-91.

The factors examined in *Mooney*, *MCI*, *Lusardi*, and other cases cited above provide a sound, logical basis for determining whether prospective claimants are "similarly situated" with respect to the issues likely to be litigated in a case involving age-based claims in the context of large-scale workforce reductions. At the heart of the courts' inquiries in all of these cases has been whether there was a single company-wide action, or a number of separate termination decisions made on a decentralized basis. *See MCI Int'l*, 829 F. Supp. at 1446; *Lusardi*, 118 F.R.D. at 361. The courts in *Lusardi*, *MCI*, and the district court in *Grayson* approached that decision by examining *both* the evidence proffered by the plaintiffs in an attempt to establish a centrally-orchestrated pattern

or program of discrimination *and* the facts revealing how the workforce reductions (and performance-based demotions) in question were actually implemented.

Factors not considered by the Eleventh Circuit include the number of individuals adversely affected, the number of different locations, the divisions in which those individuals worked, and the number of managers involved in making the decision. Also not considered was the degree of diversity in the nature of the plaintiffs' claims. These factors all bear a direct relationship to the efficiency or inefficiency of trying the plaintiffs' claims collectively, and thus are germane when the representative action procedure has been requested. Unfortunately, the Eleventh Circuit erroneously ignored those factors.

Finally, the Eleventh Circuit also should have considered the employer's defenses, as well as the plaintiffs' allegations, in determining whether or not would-be ADEA plaintiffs were "similarly situated" and whether their claims would be appropriate for trial on a collective basis. Due process requires that an employer faced with multiple claims of age discrimination be afforded the opportunity to present any defenses it has to each such claim at the liability stage of the trial. *Lusardi*, 118 F.R.D. at 361. *Cf. Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (Due process requires that defendants be provided opportunity to present their defenses "at a meaningful time and in a meaningful manner").

Thus, the defendant-employer in an ADEA case must be afforded the opportunity to present any legitimate business explanation it may have for each of its challenged employment decisions to the jury

that will decide its liability. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Burns v. Texas City Refining*, 890 F.2d 747, 749-50 (5th Cir. 1989). Moreover, the ADEA expressly provides that an employer may not be held liable if it can show that an employment action was based on "a bona fide occupational qualification" (BFOQ), a "reasonable factor other than age" (RFOA), or a "bona fide seniority system," or that the action was necessary to comply with the laws of the country in which the workplace was located. 29 U.S.C. § 623(f)(1). Nor may the employer be held liable under the ADEA if its action was taken to observe the terms of a bona fide employee benefit plan meeting the requirements of 29 U.S.C. § 623(f)(2)(B) or if it discharged or otherwise disciplined an individual for "good cause." 29 U.S.C. § 623(f)(3).

To be meaningful, then, the employer's opportunity to present any such defenses with respect to alleged instances of age discrimination must be provided in the context of the same proceeding in which the plaintiffs present their prima facie claims, meriting separate trials when the facts and circumstances surrounding the case differ.

Such defenses, however, typically are highly individualized with respect to each person terminated or demoted. Accordingly, combining a multitude of separate terminations and demotions at a multitude of separate facilities of the same employer into a single lawsuit makes for a highly inefficient, unwieldy action.

III. IF AFFIRMED, THE ELEVENTH CIRCUIT'S DECISION WILL DEFEAT THE PURPOSE OF THE REPRESENTATIVE ACTION PROCEDURE IN SECTION 216(b) CONTRARY TO THE RULING OF THIS COURT IN *HOFFMAN-LA ROCHE*

Because the recognized purpose of § 216(b)'s representative action procedure is to promote efficiency in the trial of ADEA cases arising from "the same alleged discriminatory activity," *Sperling*, 493 U.S. at 170, it is imperative that the lower courts take "fairness and procedural considerations" into account in deciding whether the use of the representative class procedure will be appropriate in the circumstances of a particular case. The instant litigation will become unwieldy and inefficient if a court attempts to try all of the claims of discrimination involved before a single jury in one huge, protracted trial.

The district court in *Lusardi* aptly characterized such a collective proceeding as "a monster that no one can deal with, made up with a lot of individual people with specific grievances." 118 F.R.D. at 361, *quoted in MCI Int'l*, 829 F. Supp. at 1446. Clearly, a collective trial in this case will likewise be a "monster." For, the claims of the various terminated and demoted managers from K Mart's vast Southern Region, and the potential defenses K Mart may have against them, are sufficiently diverse to consume months of trial and thoroughly confuse any jury. The court in *Grayson* noted as much when it discussed the inappropriateness of conducting eleven "mini-trials" and the extreme prejudice the defendant would suffer from a such collective trial. *Grayson*, 849 F. Supp. at 789.

By ignoring these practicalities and liberalizing the requirements for use of the ADEA § 216(b) proce-

dure, the decision in this case invites expanded use of that procedure that will be unfair to employers and burdensome to the courts. That result would conflict with decisions of this and other circuits and with the intent of the ADEA. Accordingly, the petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, the *amici curiae*, EEAC and the Chamber, respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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(3)

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No. 96-98

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

K MART CORPORATION,

Petitioner,

v.

CARL HELTON, CHARLES W. KEMPTON, NICK PAYNE, JAMES E. TAYLOR, BOB WILLIAMS, AND DAVID JACK WRIGHT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the district court had acted within its discretion by allowing an "opt-in" class of former Kmart Southern Region Store Managers to pursue ADEA claims collectively under 29 U.S.C. § 216(b), where those Store Managers had, according to the court of appeals, "made substantial allegations and provided evidentiary support for their contention that they were victims of an age-motivated purge in K Mart's Southern Region from 1990 to 1992?"

2. Whether the court of appeals correctly held that the district court had acted within its discretion by permitting the original five plaintiffs to amend their complaint so as to convert the action to an "opt in" collective action under 29 U.S.C. § 216(b) at the end of the time period for discovery prescribed by the district court's local rules, based on the evidence of an age-motivated purge that had been amassed during discovery?

3. Whether, as the circuit courts have uniformly held, the "piggybacking," or "single filing," rule is available in ADEA cases, so that individuals who did not file their own discrimination charges with the Equal Employment Opportunity Commission may assert ADEA claims in court, where those claims are encompassed by EEOC charges filed by others?

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3 Moore's Federal Practice ¶ 15.08[2] (1994) 14

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The opinion of the court of appeals is published at 79 F.3d 1086. The opinion of the district court is reproduced as an appendix to the court of appeals' published opinion.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1996. The court of appeals denied Kmart's motion for rehearing and both parties' separate suggestions of rehearing en banc on June 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition Below

Kmart Corporation v. Grayson, et al. (the "*Grayson*" case) and *Kmart Corporation v. Helton, et al.* (the "*Helton*" case) were originally two multi-plaintiff actions brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (the "ADEA"). The eleven original *Grayson* plaintiffs filed their complaint on January 17, 1992. The five original *Helton* plaintiffs filed their complaint on October 29, 1992.

The complaints in both cases allege that the plaintiffs were victims of an age-motivated purge of Store Managers in Kmart's Southern Region that began in 1990, following a company-wide reorganization and the installation of a new Vice President of Kmart's Southern Region. Between 1990 and 1992, Kmart demoted approximately 151 Southern Region Store Managers and approximately 76 more resigned. This purge eliminated

approximately one-third of all Store Managers in the Southern Region. Each plaintiff was removed from his Store Manager job and assigned to a lower position.

The plaintiffs allege Kmart carried out its purge of older Store Managers using a technique known throughout Kmart as "building a case" or "building a file." Kmart would target older Store Managers for elimination and then "build a case" against them by subjecting them to months of intense scrutiny and unrelenting criticism. The company methodically filled the targets' personnel files with criticisms and threats. Those managers who did not resign under the pressure of this inquisition would be demoted based upon the so-called "record" that had been compiled. Each plaintiff's personnel file contains some 40 to 60 critical reports, the great majority of which were generated in the months immediately preceding his demotion.

In January of 1993, Kmart moved to sever the claims of the five *Helton* plaintiffs and transfer their cases to the districts in which the stores that they had managed were located. Kmart argued that the cases did not meet the standard for joinder under Rule 20, Fed. R. Civ. P.[1] In April of 1993, Kmart filed an essentially identical motion in *Grayson*. On September 30, 1993, the Honorable Marvin K. Shoob (who was presiding over the *Helton* case) denied Kmart's severance motion in *Helton*.

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[1] Rule 20(a) provides, in pertinent part:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transaction or occurrences and if any question of law or fact common to all these persons will arise in the action.

On February 22, 1994, the Honorable Julie E. Carnes (who was presiding over the *Helton* case) granted Kmart's severance motion in *Grayson*, breaking up that case into eleven separate civil actions. In a separate order, Judge Carnes then transferred the five *Grayson* plaintiffs who had managed Kmart stores outside of Georgia to a total of four other United States District Courts.

On February 28, 1994, the *Helton* plaintiffs moved to amend their complaint to specify that the action was brought, under 29 U.S.C. § 216(b),[2] on behalf of the named plaintiffs and others "similarly situated." The plaintiffs asked the district court to allow additional plaintiffs to intervene if they fell within the following definition of "similarly situated" individuals:

> Each person who (1) was demoted from the position of General Store Manager of any store in Kmart's Southern Region at any time between January 1, 1990 and December 31, 1992, or who resigned from such a position during the same time period after being told that he or she would be demoted if he or she did not resign, and (2) was, at the time of the demotion or resignation, at least 40 years old.

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[2] Section 216(b) provides that:

> An action to recover the liability prescribed . . . may be maintained in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Judge Shoob granted this motion in an order entered July 21, 1994. Each of the five district judges presiding over the various severed *Grayson* plaintiffs (including Judge Carnes) allowed those plaintiffs, in one way or another, to discontinue prosecution of their individual suits and join in the *Helton* class action. In addition to the eleven *Grayson* plaintiffs, ten other demoted Kmart Store Managers filed notices opting in to the *Helton* case.

Judge Shoob subsequently modified slightly the temporal scope of the "opt-in class" and certified his July 21 order for interlocutory appeal. The court of appeals granted leave to pursue the interlocutory appeal in *Helton*.[3]

On April 9, 1996, the court of appeals issued its ruling in the *Helton* appeal. The court affirmed Judge Shoob's class order in all respects, except that it modified Judge Shoob's "temporal definition" of the class; that is, the time frame within which individuals had to have been demoted in order to meet the applicable statutes of limitations and thus be able to "opt in" as plaintiffs.

Without reservation or ambiguity, the court of appeals endorsed the plaintiffs' central contention, that the claims of all store managers demoted in the 1990-92 purge should be litigated collectively. The court held that the evidentiary record was "more than sufficient" to meet the requirements for collective litigation under *both* 29 U.S.C. § 216(b) and Fed. R. Civ. P. 20:

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[3] While the *Helton* appeal was pending, the Equal Employment Opportunity Commission sought and obtained permission from Judge Shoob to intervene in the *Helton* case under 29 U.S.C. § 626(b).

> Essentially we hold that the "similarly situated" requirement of § 216(b) is more elastic and less stringent than the requirements found in Rule 20 (joinder) and Rule 42 (severance). We also hold that a unified policy, plan, or scheme of discrimination may not be required to satisfy the more liberal "similarly situated" requirement of § 216(b), even though in the instant case, we are persuaded that the allegations, affidavits, and depositions meet a standard of greater stringency than the "similarly situated" standard found in § 216(b). Indeed in this case, the record is more than sufficient to meet either standard.

Grayson v. K Mart Corp., 79 F.3d 1086, 1095-96 (11th Cir. 1996).

The court of appeals relied largely on *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989), observing that collective litigation is favored under the ADEA. *See* 79 F.3d at 1096, *quoting Sperling*, 493 U.S. at 170 ("Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively."). In addition, the court examined the record and found a substantial quantity of evidence showing that the Store Manager demotions were part of "an age-motivated purge in K Mart's Southern Region":

> [T]he plaintiffs have made substantial allegations and provided evidentiary support for their contention that they were victims of an age-motivated purge in K Mart's Southern Region from 1990 to 1992.

79 F. 3d at 1097. The court of appeals devoted several pages of its opinion to a summary of the plaintiffs' extensive evidence of the purge. 79 F.3d at 1097-99.

The Eleventh Circuit subsequently denied Kmart's motion for rehearing and both parties' separate suggestions of rehearing en banc.[4]

2. Statement of Facts

The record contains a dramatic and substantial body of evidence that Kmart had a plan to eliminate older Store Managers in its Southern region. Each plaintiff relies on this body of evidence to argue that his demotion was part of the discriminatory plan and hence motivated by age. The hundreds of factual and legal issues arising from this body of evidence are exactly the same in each plaintiff's case. It would be logistically and financially impossible for the plaintiffs to present this evidence effectively in individual cases. This is why the plaintiffs contend (and the Eleventh Circuit has held) that the claims must be litigated collectively under 29 U.S.C. § 216(b).[5]

The Eleventh Circuit discussed much of the plaintiffs' collective evidence in its opinion. 79 F.3d at 1097-99. For illustrative purposes, we reproduce an excerpt here.

> The plaintiffs' statistical expert, Leonard Cupingood, stated in his affidavit that . . . "the disparity between the actual and expected number of older store

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[4] The plaintiffs' suggestion of rehearing en banc addressed solely the panel's controversial decision on certain statute of limitations issues, which govern the "temporal scope" of the opt-in class. The plaintiffs anticipate filing their own petition for a writ of certiorari to review the court of appeals' resolution of the statute of limitations issues.

[5] This is also why breaking up a multi-plaintiff suit into many individual cases represents such an attractive defense strategy in ADEA and other employment discrimination cases.

managers who were demoted is statistically significant" for the period between January 1, 1990 and December 31, 1992. (Cupingood Aff. at 3).

The evidence before Judge Shoob also showed that K Mart decisionmakers, from the Southern Region's Vice President up to K Mart's CEO, expressed their intent to purge K Mart of older managers. Joseph Antonini, who became President, CEO and Chairman of K Mart in 1987, acknowledged at [his] deposition that he had undertaken a "program to renew" K Mart's image. (Antonini Dep. at 31)(HR-104, Ex. 4). On October 10, 1989, Antonini gave a press briefing on "K Mart's present and future direction," in which he reported that:

> K Mart has one of the youngest and most aggressive management teams in retailing today. The average age of the 32-person corporate officer group is less than 50 years old with an average retail experience exceeding 22 years. Our store managers average 15 years service in our company. K Mart is confident that the team in place will move the company forward.

(Transcript of Remarks of J.E. Antonini at Press Briefing of Oct. 10, 1989, at 3)(HR-104, Ex. 4). Antonini had made similar comments in a speech on September 12, 1990, that was broadcast over K Mart's satellite network. (Antonini Dep. At 30). He testified that he was "proud" of the management team because they "had a lot of experience and a lot of longevity left." (Antonini Dep. At 39).

Don Keeble, K Mart's director of nationwide store operations made similar remarks. According to third parties who had dealt with Keeble in negotiating contracts for the cleaning of K Mart's stores, Keeble said that K Mart was "'working to change its image,'" and wanted its stores to "'have a fresher, cleaner, and younger look.'" (Powers Aff. At 2)(HR-104, Ex.3). Keeble also said that the "'problem'" that K Mart had with its older store managers was that they "'were accustomed to the old way of doing things,'" but that he "'didn't want to re-educate these people, because they still wouldn't fit into the spirit of the new image that he and Mr. Antonini wanted;'" *id.*, that "'K Mart was promoting a younger image in management,'" (Marzano Aff. at 2), and that K Mart had a lot of "'old wood'" that was really "'dead wood.'" *Id.* at 3.

Similarly, prior to becoming K Mart's Southern Regional Vice President, John Valenti said: "That's the trouble with K Mart. It's these older store managers. But we are planning to do something about it." (Marzano Supp. Aff. at 3) (HR-104, Ex. 2). Furthermore, the plaintiffs allege that after John Valenti became K Mart's Regional Vice President of the Southern Region, the job performance evaluations of the older store managers nearly all dropped from "Competent" or "Commendable" to "Needs Improvement," "Unsatisfactory," or "Below Expectations," while there was no similar downgrading of younger store managers' performances. (Pl's Initial Brief at 14-17). Indeed, the chart which Robert McAllister, Valenti's predecessor as Southern Region Vice President, created at the instruction of Tom Watkins, K Mart's Senior Vice President of Store

> Operations, reveals that every manager under the age of thirty-nine who had been rated "Below Expectations" was scheduled to be reappraised in the near future, while six of the eight of the managers over the age forty-five who had been rated "Below Expectations" [were] demoted or resigned. (Summary Chart, Mar. 23, 1990)(HR-104, Ex. 26).
>
> The plaintiffs further allege that K Mart targeted older store managers for criticism and built a paper trail that would be grounds for their demotion. On November 1, 1985, McAllister and another Region Manager, Clifton, sent a confidential memorandum to all district managers notifying them that a new store management structure would "most probably" be in place in the near future, and instructing them to begin "building a case" to terminate low performing Resident Assistant [store] managers. (Confidential Mem. from McAllister and Clifton to District Managers, Nov. 1, 1985)(HR-104, Ex. 26). In 1988, Valenti assured David Marzano, who had contracted to clean K Mart's stores, that if Marzano encountered any problems with the older store managers, he, Valenti, would "build a file" on that manager. (Marzano Supp. Aff. at 3)(HR-104, Ex. 2). Charles Wester, a Southern Region Loss Prevention District Manager, testified that he was criticized by Valenti for not having done more to build cases against older store managers. (Wester Dep. At 264)(HR-104, Ex. 49).

79 F.3d at 1097-98 (footnote omitted).

REASONS FOR DENYING THE WRIT

Kmart's petition asks this Court to review noncontroversial and mostly discretionary rulings. There is no split of authority among the circuits as to any issue Kmart raises.

1. The Decision to Permit the Case to Proceed Collectively under 29 U.S.C. § 216(b) Lay Within the District Court's Discretion and Was Fully Justified by the Record.

The decision to permit collective ADEA litigation under 29 U.S.C. § 216(b) has been uniformly held to lie within the district court's discretion, and no court of appeals has ever reversed a district court for either permitting or denying collective status in such a case. *Grayson v. K Mart Corp.*, 79 F.3d at 1097; *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1213 (5th Cir. 1995)("Once the correct legal standard is ascertained, the district court's application of the standard must be reviewed for abuse of discretion."). The ruling below, allowing individuals with evidence that they had been caught up in the 1990-92 purge of Kmart's Southern Region to sue collectively, comports with this Court's holding in *Hoffman-La Roche, Inc., v. Sperling*, 493 U.S. 165 (1989), encouraging collective ADEA litigation. The ruling is fully justified by the substantial body of evidence, upon which each individual plaintiff relies, that Kmart's purge of managers was age-motivated. The ruling properly recognizes that it would be impossible for each manager to present this evidence effectively in an individual trial.

In *Sperling*, this Court held that a district court may authorize and facilitate notice of a collective ADEA action brought under 29 U.S.C. § 216(b). The district court's active

involvement in the notification process, the Court held, gave effect to a statutory policy favoring collective ADEA litigation:

> The ADEA, through incorporation of §216(b), expressly authorizes employees to bring collective age discrimination actions "in behalf of . . . themselves and other employees similarly situated." 29 U.S.C. §216(b) (1982 ed). Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively. A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.
>
> These benefits, however, depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.

493 U.S. at 170.

Kmart challenges the Eleventh Circuit's ruling that the "similarly situated" test of § 216(b) is less demanding than the Rule 20 test for joinder. Petition at 12-13. Kmart argues that *Sperling* should be read to restrict collective ADEA cases to those that satisfy the standard for joinder under Rule 20, Fed. R. Civ. P. Kmart claims that *Sperling* intentionally invoked the "common issues of law and fact" standard of Rule 20:

> The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.

493 U.S. at 170.

The suggestion that *Sperling* restricts collective ADEA litigation to those cases where it is already permitted under Rule 20 makes no sense. *Sperling* emphasizes that congressional policy favors collective litigation of ADEA cases. Since all federal court litigation is subject to Rule 20, *Sperling* has to mean that the ADEA offers a greater opportunity for joinder then other claims; otherwise, the pronouncement that collective litigation is favored in ADEA cases would be meaningless. The language Kmart quotes means simply that the considerations favoring joinder in all federal court litigation--efficiency and economy--also favor collective ADEA litigation.

Moreover, any distinction between the § 216(b) "similarly situated" test and the Rule 20 joinder standard would be academic here, because the court of appeals held that the record " is more than sufficient to meet either standard." 79 F. 3d at 1095-96.

The court of appeals' decision does not conflict with any other circuit court decision, including the Fifth Circuit's ruling in *Mooney*. *Mooney* affirmed, also under the "abuse of discretion" standard, a district court's decision to "decertify" an ADEA class shortly before trial. The court concluded:

> From the record, it is apparent that in this case, no mater how we analyze the similarly situated requirement, we cannot say that the district court

> abused its discretion in finding that the "opt-in" plaintiffs were not similarly situated.

54 F.3d at 1216.

In marked contrast to this case, the *Mooney* record contained no common core of evidence showing a plan to purge older employees:

> Other than the global allegations of Plaintiffs that the ADEA was violated, that they were formerly Aramco employees, and that they were in the protected age group over forty, there is no real commonality among the named Plaintiffs and the "opt-in" group.

54 F.3d at 1215. Of course, the mere fact that the district court in *Mooney* had decertified a class, while the district court here approved a class, does not create a conflict between the two appellate decisions.

2. The Timeliness of the Plaintiffs' § 216(b) Motion Lay Within the District Court's Discretion.

Kmart contends that Judge Shoob should have denied the plaintiff's § 216(b) motion because it was filed too late in the case. At most, this amounts to an argument that Judge Shoob abused his discretion by allowing the plaintiffs to amend their complaint so as to explicitly state that the action was brought on behalf of other "similarly situated" plaintiffs under § 216(b).

This decision rested within the district court's discretion. There are, moreover, few federal policies more solidly established than that favoring liberality of pleading amendments.

Foman v. Davis, 371 U.S. 178 (1962); 3 *Moore's Federal Practice* ¶ 15.08 (1994).

The timing of the class amendment made perfect sense and did not prejudice Kmart. Much of the plaintiffs' "evidentiary support for their contention that they were victims of an age-motivated purge in K Mart's Southern Region from 1990 to 1992," 79 F.3d at 1097, was gathered during the discovery period. Had the plaintiffs sought class treatment earlier, Kmart doubtless would have resisted certification as premature. As did the substance of the § 216(b) ruling, the timing lay fully within Judge Shoob's discretion, and does not merit grant of the writ.

3. The "Piggybacking," or "Single Filing," Rule is Universally Applied in ADEA Cases.

The "piggybacking," or "single filing," rule, permits an individual to assert a Title VII or ADEA claim in federal court without first having filed a charge of discrimination with the Equal Employment Opportunity Commission. The plaintiff "piggybacks" on one or more charges filed by others, where those charges put the employer on notice that others might assert similar claims and thereby fulfill the purpose of the EEOC charge for a class of potential plaintiffs.

The piggybacking rule is not controversial. Every circuit to have addressed the issue has permitted "piggybacking" by ADEA plaintiffs. *Howlett v. Holiday Inns, Inc.*, 49 F.2d 189, 194 (6th Cir. 1995); *Anson v. University of Texas Health Science Center*, 962 F.2d 539, 540 (5th Cir. 1992)("The federal courts now universally hold that an individual who has not filed an administrative charge can opt-in to a suit, filed by any similarly situated plaintiff under certain conditions.").

The Eleventh Circuit held that piggybacking was available in ADEA cases, but applied an extremely narrow version of the rule. Among other things, it held that a § 216(b) opt-in plaintiff may piggyback only on a charge filed by an individual who later turns out to be an original named plaintiff in the "class" action, even though a charge filed by another would have given the employer the same notice and opportunity to conciliate the claims of the potential class. 79 F.2d at 1102-05. Kmart cannot, therefore, seriously challenge the manner in which the court of appeals applied the rule, only its decision whether to apply it at all. Since piggybacking is universally recognized, the Eleventh Circuit's decision does not warrant granting the writ.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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